Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism

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This Article presents a normative model of proportionality review under the Cruel and Unusual Punishments Clause. The model divides proportionality review into two organizing concepts: "quantitative proportionality," which concerns the temporal length of the sentence imposed, and "qualitative proportionality," which concerns the methods used to punish the individual and the conditions under which the punishment is imposed. With the quantitative-qualitative structure suggests that the Cruel and Unusual Punishments Clause should be understood to mandate review of the qualitative proportionality of the punishment, but not its quantitative proportionality.

The key feature of this model is an appreciation for the role of human dignity as that concept relates to the Eighth Amendment. As the Supreme Court has recognized, the basic concept underlying the Eighth Amendment is "nothing less than the dignity of man." The quantitative/qualitative proportionality model respects this guidance by suggesting that only punishments that are truly violative of human dignity must be invalidated as disproportional. Further, this model is consistent with the text of the Eighth Amendment, relieves the structural tensions inherent in judicial review of legislatively-determined sentence length, and gives courts an active, vigorous role in policing inhumane punishments. It also would end the slow-motion doctrinal train wreck that is the determination of whether a given prison term is quantitatively "too long"—something courts and scholars have proven themselves unable to accomplish coherently.

Importantly, this model also functions as a specific critique of retributive punishment theory. Retributivists often point to the Cruel and Unusual Punishments Clause as mandating retributivism as a side constraint on governmentally-imposed punishment. However, to the extent human dignity is considered to be the primary animating principle behind the Clause, and to the extent that mandatory quantitative proportionality review is undermined on that basis, it becomes far less clear that the Eighth Amendment mandates, or even suggests, punishment consistent with retributivism.

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> *[C]ruelty is a deliberate and focused attempt to cause pain so that the torturer may receive pleasure in another's suffering. It is tearing off a butterfly's wings and then smiling as the insect squirms on the ground. It is offering cutting remarks and then savoring the attempt to salvage some dignity. It is the most ugly of all vices.*[1]

I. INTRODUCTION

I had a client named Richard[2] who was convicted of felony drug crime. At the time of his conviction, Richard was in his late thirties. No violence was involved in the incidents leading to his arrest, and Richard had a short and unimpressive criminal history at the time of his conviction. He was sentenced to approximately eight years in prison, spending most of his time

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[1] Stephen K. George, *The Emotional Content of Cruelty: An Analysis of Kate in* East of Eden, *in* THE MORAL PHILOSOPHY OF JOHN STEINBECK 131 (Stephen K. George ed., 2005).

[2] For purposes of confidentiality, I have changed the name of my client and omitted certain identifying details. No other details recounted herein have been altered.

in high security facilities. Richard served almost all of the eight-year sentence, finally leaving prison when he was in his mid-forties.

About halfway through his stay in prison, Richard suffered a severe injury that would eventually require arthroscopic surgery. After almost two and a half years of substandard (and at times nonexistent) care, Richard, acting pro se, initiated an action in federal court alleging that his treating physicians were deliberately indifferent to his medical needs[3] and thereby violated his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.[4] The case attracted my attention,[5] and I became Richard's pro bono counsel more than a year after his complaint had been filed.

Throughout the representation, one thing that struck me was how Richard reflected upon his time served. Over the three years I represented him, I never once heard Richard complain about the length of his incarceration, which to me seemed quite long relative to the severity of his offense and his unremarkable criminal history. I found Richard's sanguinity somewhat surprising, given that at the time of his arrest, Richard had children, decent job prospects, and what appeared to be a vibrant family life. By any measure, a significant portion of the prime of Richard's life was spent behind bars, and yet I never once heard him complain about the length of his sentence.

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[3] Eighth Amendment liability for substandard medical care is evaluated under a "deliberate indifference" standard, which has two elements: first, that the inmate had an objectively "sufficiently serious" injury, and second, that the defendant knew of and disregarded an excessive risk to his health and safety. This second prong is essentially a recklessness standard. Farmer v. Brennan, 511 U.S. 825, 828, 834, 837 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment . . . . [Deliberate indifference is established when] the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

[4] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[5] What drew me to the case was that Richard had defeated the state's motion to dismiss while acting pro se. As anyone familiar with pro se prisoner suits under 42 U.S.C. § 1983 or *Bivens* will tell you, many are frivolous, and very few will survive the state's motion to dismiss or, alternatively, the state's Rule 56 motion for summary judgment, which often takes the functional place of a motion to dismiss. *See* 42 U.S.C. § 1983 (2006); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). A complaint that does survive the state's dismissal motion—either because of the strength of the allegations in the complaint, the conscientious efforts of the pro se plaintiff, or both—merits notice, since it is a fairly rare occurrence.

Richard would, however, complain stridently about the conditions under which he served his time. He described a prison world that was overcrowded and often violent—a place where mental relaxation and trust of fellow inmates was nonexistent. He described a medical system that was largely unresponsive to conditions that could not be easily discerned by sight,[6] and a system of discipline that was—to his eyes—often arbitrary. It bears noting that Richard served his time in institutions that would not be considered amongst the worst in the nation—not even close. This was a sobering thought.[7] While anecdotal reflections are not, of course, necessarily generalizable, Richard's experience does comport with well-known findings on the state of the American prison system.[8] What struck me most, though,

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[6] My review of Richard's medical records confirmed the patent inadequacy of the medical care he received. Conditions like rashes or other outwardly apparent ailments were treated promptly, while injuries or illnesses whose diagnosis would require more than a cursory visual examination went largely untreated. This observation was buttressed by our deposition of the prison doctors named in Richard's complaint; we discovered that "medical examinations" often consisted of nothing more than a quick look through the cell window or feeding porthole, which, depending on the institution, might be smaller than a laptop computer screen. It became our impression that this was common practice at state facilities. *See* DAVID RUDOVSKY ET AL., THE RIGHTS OF PRISONERS 79 (4th ed., 1988) ("In many prisons, only the most serious ailments are treated . . . minor ailments are often ignored for lack of a doctor or nurse or for more callous reasons . . . .").

[7] It bears noting that Richard was no shrinking violet; he is a physically large, smart, tough individual who was not laboring under any illusions about what he should have expected while incarcerated. On a number of occasions, he said to me that while he did not expect medical care like he would have gotten in a hospital, he nevertheless felt that his right to even a minimal level of care was ignored. He was not, in other words, what some have labeled a "sensitive" inmate. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 201 (2009) (sensitive inmates experience more distress than insensitive ones given identical conditions of incarceration).

[8] Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 505 (1997) ("Many commentators have acknowledged what is now referred to as the 'national scandal of living conditions in American prisons.'"); *see also* Michael B. Mushlin, *Foreword: Prison Reformed Revisited: The Unfinished Agenda, October 16–18, 2003*, 24 PACE L. REV. 395, 396 (2004) (discussing federal courts' responses to "barbaric prison conditions"); Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 564 (2006) (exploring the "problem of prison rape"); Davis Forsythe, Gangs in California's Prison System: What Can Be Done? 2 (Jan. 27, 2006) (unpublished manuscript *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977010) ("Prison gangs have been clearly linked to significantly increased levels of violence within prisons."); John V. Jacobi, Prison Health, Public Health: Obligations and Opportunities 3–10 (Aug. 18, 2005) (unpublished manuscript *available at* http://papers.ssrn.com/sol3/papers.cfm ?abstract_id=789007) (noting the low state of prison medical treatment, and exploring public health implication of large number of under-treated prisoners with HIV,

about Richard's refusal to complain about the length of his sentence, when contrasted to his strident objections to the conditions under which he served it, was that his complaints touched on a controversial and unsettled segment of Eighth Amendment law: the debate over proportionality under the Cruel and Unusual Punishments Clause. Richard's experience strengthened my conviction that proportionality jurisprudence, which struggles to articulate a workable theory of proportionality between the crime committed (or the culpability of the offender, or both) and the temporal length of custodial sentences, is fundamentally misguided. How and why this is (and how it affects individuals like Richard) is the subject of this Article.

It has become conventional wisdom that Eighth Amendment proportionality jurisprudence is a mess.[9] This is perhaps not surprising; in the past few decades, the Supreme Court has issued scores of opinions regarding the scope of the Cruel and Unusual Punishments Clause, many concerning the existence (or lack thereof) of a proportionality principle.[10] Some of those

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other sexually transmitted diseases, chronic illnesses, and mental illness). *See generally* James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 100–01 (2003) (describing the American "practices of imprisonment, with their use of humiliating uniforms and utter denial of privacy to most inmates," and contrasting the American tendency to inflict upon prisoners "degrading" punishments to certain European nations like Germany, which increasingly practice "respectful" incarceration which aims to approximate the conditions of outside society in order to rehabilitate prisoners).

[9] *See, e.g.*, Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 107 (1996) (arguing that the Court's proportionality jurisprudence is "confused"); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528 (2008) (arguing that the last twenty-five years of Supreme Court proportionality decisions "do not provide practical guidance or a coherent theoretical framework for analyzing proportionality challenges"); Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) (arguing that the Court's Eighth Amendment jurisprudence is plagued by deep inconsistencies concerning the text, the Court's role, and a constitutional requirement of proportionate punishment); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1251–53 (2000) (arguing that the Court's refusal to subject custodial sentences to searching proportionality review is incompatible with its increasing scrutiny of punitive damages awards).

[10] In the last thirty years, the Court has spoken six times on the discrete issue of the existence (or lack thereof) of a proportionality principle for custodial incarceration, with inconsistent results. Lockyer v. Andrade, 538 U.S. 63, 72 (2003); Ewing v. California, 538 U.S. 11, 14 (2003); Harmelin v. Michigan, 501 U.S. 957, 962 (1991); Solem v. Helm, 463 U.S. 277, 279 (1983); Hutto v. Davis, 454 U.S. 370, 372–73 (1982) (per curiam); Rummel v. Estelle, 445 U.S. 263, 274 (1980). Most commentators have come to the conclusion that the end result of this convoluted line of cases is that "the Supreme

decisions cannot be easily reconciled.[11] The Supreme Court has admitted as much: "[O]ur precedents in this area have not been a model of clarity. Indeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow."[12]

Scholarship considering the Cruel and Unusual Punishments Clause has embraced the notion that something is wrong with proportionality jurisprudence, and scholars have been active in recent years attempting to articulate descriptive and normative explanations of a proportionality principle.[13] These efforts largely bemoan the Court's inability to articulate

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Court . . . has effectively declared proportionality a dead letter in current law." Whitman, *supra* note 8, at 89.

[11] *Compare Harmelin*, 501 U.S. at 965 ("[T]he Eighth Amendment contains no proportionality guarantee."), *with Lockyer*, 538 U.S. at 72 ("A gross disproportionality principle is applicable to sentences for terms of years.").

[12] *Lockyer*, 538 U.S. at 72 (citations omitted).

[13] *See, e.g.*, Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Questions Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35, 45 (2008) ("The Eighth Amendment indisputably invites a moral inquiry. The Court has, however, treated the Amendment's words as describing a conceptual chameleon and inviting multiple, distinct moral inquiries."); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 574 (2005) (exploring retributive and non-retributive proportionality principles to lengthy prison sentences); D. Lee, *supra* note 9, at 528 (proposing "three principles: transparency, limited deference, and a 'felt sense of justice' . . . [to] contribute to the development of a more coherent jurisprudence of proportionality"); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 111 (2007) (arguing that the Court's "narrow and formalistic reading of the Eighth Amendment" has allowed "longer and meaner" sentences and more "degrading and dangerous" prison conditions); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 263, 278 (2005) (examining proportionality as a constitutional limitation on the power to punish; arguing that the constitutional proportionality requirement is better understood as an external limitation on the state's penal power that is independent of the goals of punishment); Carol S. Steiker, Panetti v. Quarterman*: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 290 (2007) (exploring the "tensions and uncertainties that plague the Supreme Court's Eighth Amendment jurisprudence"); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1747, 1770 (2008) (arguing that the word "unusual" was a term of art that referred to government practices that deviate from "long usage," and therefore the principal danger against which the Cruel and Unusual Punishments Clause was designed to protect is the "tyranny of enflamed majority opinion"); Gershowitz, *supra* note 9, at 1249; Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments,"* 122 HARV. L. REV. 960, 961 (2009).

compelling theoretical justifications for its proportionality decisions,[14] and most decry the Court's general unwillingness to submit to close scrutiny what these scholars believe are unduly long custodial sentences.[15] Some scholars have drawn the camera back, and explored the primary justifications for punishment (incapacitation, deterrence, rehabilitation, and retribution), and—especially in the case of retributivism—offered sophisticated analyses of how courts' current understanding of proportionality should be informed by theory.[16]

While enlightening and well-intentioned, these efforts have largely failed at offering compelling normative models for ordering Eighth Amendment jurisprudence in a way that fulfills what should be the four goals of any proportionality regime:

(1) consistency with the text of the Cruel and Unusual Punishments Clause;
(2) respect for the divided institutional responsibility for sentencing implementation and administration;
(3) objective, coherent, and replicable methodology; and
(4) reasonable consistency with Supreme Court precedent.

Most proposed proportionality regimes arguably fail each of these goals, including the Supreme Court's current regime, which is best described as "limited" or "narrow" proportionality review, and very rarely results in an invalidated sentence.[17] Is there a common thread amongst these models that can account for their shortcomings? Yes. I believe that the reason these

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[14] *See supra* note 13; *see also* Samuel B. Lutz, Note, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. REV. 1862, 1863–66 (2005) (exploring the social values that should inform the interpretation of the Eighth Amendment, arguing that "there has been a general failure to develop any larger theory of the Eighth Amendment").

[15] *See, e.g.*, D. Lee, *supra* note 9, at 583 (arguing that "[p]roportionality in noncapital criminal sentencing can [and should] be resuscitated by clarifying the theoretical framework already contained in Supreme Court precedent"); Note, *supra* note 13, at 962–63 ("[R]ejecting a proportionality requirement may not be consistent with original intent.").

[16] *See, e.g.*, Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683–84 (2005) [hereinafter Lee, *Constitutional Right*] (proposing a model of "retributivism as a side constraint" as a conception of proportionality review that could harmonize seemingly disparate proportionality case law).

[17] James Headley, *Proportionality Between Crimes, Offenses, and Punishments*, 17 ST. THOMAS L. REV. 247, 253–57 (2004) (describing "narrow" review); Jeffrey Chemerinsky, Note, *Counting Offenses*, 58 DUKE L.J. 709, 743 (2009) (describing "the narrow proportionality requirement").

models fail is because any proportionality regime that requires the temporal length of a sentence to be "proportional" with the severity of the crime or the culpability of the offender is bound to fail goals one and three above, and likely to fail goal two.[18] Only a proportionality regime that seeks to regulate the *method* of punishment (defined broadly), and not the temporal length of a sentence, can even in theory fulfill all four goals identified above.[19]

Part II of this Article briefly recounts the thorny issues that have bedeviled efforts to articulate a coherent model of Eighth Amendment proportionality. First, I consider how courts have struggled to give consistent meaning to the Cruel and Unusual Punishments Clause, suggesting that the core of the problem lies in persistent differences in constitutional interpretive theory. Second, I recount how the literature has struggled to reconcile a regime of proportionality with the Supreme Court's view that a punishment is constitutionally justified so long as it rationally furthers any reasonable penological theory. I further consider how the literature has struggled to articulate a coherent normative account of moral desert in relation to proportionality determinations. Ultimately, I conclude that these problems are intractable when courts fail to properly account for the idea that there are in fact *two* types of proportionality review, only one of which is actually mandated by the Cruel and Unusual Punishments Clause.

In Part III, I describe these two types of proportionality review: "quantitative proportionality" review and "qualitative proportionality" review. "Quantitative proportionality" refers to the proportionality, under any penological theory, between the crime committed (or the culpability of the offender, or both) and the temporal length of the punishment imposed.[20] It can be likened to what others have called "proportionality of amount."[21] Most salient would be the length of the incarcerative sentences imposed on individuals, but the concept also applies to the duration of non-custodial sentences like probation or community service. On the other hand, "qualitative proportionality" refers to the proportionality, under any

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[18] The fourth goal, that a proportionality regime be "reasonably consistent with past Supreme Court precedent," is perhaps better described as an aspirational goal, although if one aspires to move beyond the realm of the theoretical and into the realm of spurring real change in the jurisprudence, this goal is perhaps more important than all the other factors combined. *See* Whitman, *supra* note 8, at 93 ("To the extent we claim to be seeking the correct moral stance, we have an obligation to take careful stock of the realities of the society in which we live."). As discussed below, the normative account I supply here, which diverges in important respects from the Court's current regime, in fact would align the form of the proportionality regime with its current "limited" or "narrow" substance, with minimal doctrinal upheaval. *See infra* Part III.

[19] *See infra* Parts III–IV.

[20] *See infra* Part III.A.

[21] Claus, *supra* note 13, at 38.

penological theory, of the crime committed (or the culpability of the offender, or both), and the non-durative conditions of the punishment imposed.[22] Put another way, qualitative proportionality refers to the "viciousness of method"[23]—for instance, placement in solitary confinement, infliction of corporal punishment, exposure to risk of violence or injury, inability to access medical care, infliction of capital punishment, etc. Importantly, qualitative proportionality concerns itself with the "mundane" aspects of punishment, which include familiar condition-of-confinement issues: indifference (or lack of attention) to medical needs, overcrowding, etc. Qualitative proportionality review seeks to determine whether the conditions of punishment as the individual experiences those conditions is commensurate with the crime committed, the culpability of the offender, or both, under any penological theory.

One of the reasons the literature has failed to offer compelling models of proportionality review is because the literature has failed to divide proportionality into its constituent "qualitative" and "quantitative" aspects. Most scholars, as I argue in Part III, have simply assumed (wrongly) that the "cruel and unusual" language in the text is synonymous with "excessiveness" and "proportionality."[24] This assumption is incorrect, both as a matter of linguistic common sense and textual interpretation.[25] Many scholars (and courts) have read the Eighth Amendment ratification history, along with the pre- and early-post-adoption case law to suggest that originalist arguments support the notion that quantitative proportionality is required under the Clause.[26] However, I find that these arguments depend on evidence and case law interpretation that is, at best, weakly suggestive of this proffered conclusion.[27] Ultimately, I conclude that requiring quantitative proportionality between crime/culpability and punishment cannot be reconciled with the text or early history of the Eighth Amendment, and cannot be rationally and predictably applied by reviewing courts.

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[22] *See infra* Part III.A.

[23] Claus, *supra* note 13, at 38. Professor Claus puts forth another candidate for the moral basis of the Eighth Amendment, "discrimination in application," and asserts that "[t]he Eighth Amendment proscribes only punishments that are both cruel and *unusual*. An antidiscrimination conception most closely translates the historic text into a modern context." *Id.* at 38–39.

[24] *See, e.g.*, Chemerinsky, *supra* note 17, at 734 ("The Eighth Amendment and the Due Process Clause (which has never been applied in these cases) are the sole constitutional restrictions on excessive sentencing.").

[25] *See infra* Part III.

[26] *See infra* Part II.

[27] *See infra* Part II.

Rather, I suggest that requiring qualitative proportionality between crime/culpability and sentence does fulfill the four goals outlined above. It is consistent with the text. It can be (and has been) applied rationally by courts. It gives proper respect to the institutional roles and competencies of the legislatures and the courts, by confining courts to the job they do well—policing the conditions of punishment —and limiting their authority to do a job they do not do well: determining how long a sentence "should be."

In Part IV, I offer a purposive argument that supports this qualitative/quantitative model, and that also addresses a third failing in the literature to date: an under-appreciation of the role of human dignity in the context of proportionality jurisprudence. I argue that there is no compelling justification for the notion that the length of custodial sentences is relevant to determining whether a given punishment violates notions of human dignity. Rather, it is the *conditions* of punishment that can impugn dignity, and it is those conditions of punishments which qualitative proportionality properly gauges in relation to the crime, the culpability of the offender, or both. The proportionality model presented here—one that bars quantitative proportionality review, but engages in vigorous qualitative proportionality review—fulfills the most basic directive of the Eighth Amendment by requiring courts to monitor conditions of punishment so that human dignity, the central concern of the Eighth Amendment, is not gratuitously violated.[28]

Finally, in Part V, I consider the implications of this model on retributive punishment theory in the American system. Advocates of retributive punishment theory like to argue that justification can be found in the Eighth Amendment; they argue that the ban on "cruel and unusual" punishment is, in essence, a command that the punishment received by an offender be tied to his desert—in other words, that punishment be gauged in proportion to blameworthiness. The model presented here refutes this claim. If it is true that there is no quantitative limit imposed by the Eighth Amendment, then it is necessarily true that the Amendment does not require retributively proportional sentences. While this is not an argument that there should not be qualitative proportionality between crime (or the culpability of the suspect, or both) and punishment as a matter of substantive legislative principle, it is an argument that such a result cannot be accomplished via the Cruel and Unusual Punishments Clause of the Eighth Amendment.

It is time, as they say, to pronounce the body of Eighth Amendment quantitative proportionality dead,[29] and to begin working on a model that can explain courts' willingness to closely monitor conditions of confinement, while also explaining courts' unwillingness to strike down custodial

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[28] *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[29] Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1521 (2008).

incarcerations on the basis of temporal length. The model presented here does both, fulfilling the textual command of the Eighth Amendment that punishments not be "cruel and unusual," and fulfilling its purposive place in the constitutional structure as a guarantor of human dignity while respecting the shared nature of punishment in the American system.

II. THE PROPORTIONALITY "MESS"

"Confused," "inconsistent," and "uncertain" are but some of the adjectives used to describe the Supreme Court's Eighth Amendment proportionality jurisprudence.[30] Some even describe the Court as exhibiting "schizophrenia" on the subject.[31] It certainly seems true that "the state of the law with respect to proportionality in sentencing is confused, and what law can be discerned rests on weak foundations."[32] The genesis of this confusion is the Court's contradictory holdings on the question of proportionality for non-capital sentences, which even the Court itself admits "ha[s] not been a model of clarity."[33] Over the last thirty years, the Court's direction, as expressed in the "Proportionality Sextet" of *Lockyer v. Andrade*, *Ewing v. California*, *Harmelin v. Michigan*, *Solem v. Helm*, *Hutto v. Davis*, and *Rummel v. Estelle*, [34] has oscillated from a pronouncement that "for crimes . . . punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative,"[35] to a clear statement that the Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed,"[36] to a plurality holding that "the Eighth Amendment contains no proportionality

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[30] *See* Grossman, *supra* note 9, at 107 (arguing that the Court's proportionality jurisprudence is "confused"); Headley, *supra* note 17, at 247 (characterizing the Court's Eighth Amendment jurisprudence as "inconsistent regarding substantive due process and proportionality in criminal cases"); Stacy, *supra* note 9, at 475 (arguing that the Court's Eighth Amendment jurisprudence is plagued by deep inconsistencies concerning the text, the Court's role, and a constitutional requirement of proportionate punishment); Steiker, *supra* note 13, at 290 (exploring the "tensions and uncertainties that plague the Supreme Court's Eighth Amendment jurisprudence").

[31] Stacy, *supra* note 9, at 478.

[32] Grossman, *supra* note 9, at 107 (arguing that the Court's proportionality jurisprudence is "confused").

[33] Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

[34] *See* cases cited *supra* note 10.

[35] Rummel v. Estelle, 445 U.S. 263, 274 (1980).

[36] Solem v. Helm, 463 U.S. 277, 284 (1983).

guarantee,"[37] to a pseudo-middle ground holding by a "convoluted plurality"[38] that while *Solem* is still good law, a sentence of twenty-five years to life for recidivist petty theft is appropriate under proportionality principles.[39] No wonder confusion reigns.

In-depth treatments of the Proportionality Sextet, along with the Court's first decision considering Eighth Amendment proportionality almost a century ago in *Weems v. United States*,[40] have been presented elsewhere, and I will not duplicate those efforts here.[41] Suffice it to say that the jurisprudence has settled into an odd place, satisfying to no one.[42] As expressed in *Lockyer*, "[a] gross disproportionality principle is applicable to sentences for terms of years" under the Eighth Amendment.[43] And yet, almost all prison sentences—no matter how seemingly unfair—are upheld as proportionate to the crime or the culpability of the offender because the bar to showing gross disproportionality is so high.[44] The facts of *Ewing* are a good example of the confused state of affairs. There, the defendant (a repeat offender with the proverbial mile-long record) was convicted of stealing approximately one thousand dollars worth of golf clubs under California's three strikes law and sentenced to twenty-five years to life.[45] The Court held that this sentence was not grossly disproportionate; the Court found it to be a

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[37] Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

[38] Headley, *supra* note 17, at 253.

[39] Ewing v. California, 538 U.S. 11, 30–31 (2003).

[40] Weems v. United States, 217 U.S. 349 (1910).

[41] *See, e.g.*, Michael P. O'Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences*, 72 TENN. L. REV. 1041, 1054–83 (2005) (exploring *Weems* and each of the six modern proportionality cases); *see also* JENNIFER E. WALSH, THREE STRIKES LAWS 79–103 (2007); G. David Hackney, *A Trunk Full of Trouble:* Harmelin v. Michigan, 27 HARV. C.R.-C.L. L. REV. 202, 274–80 (2005); Stacy, *supra* note 9, at 500–01 (discussing same).

[42] WALSH, *supra* note 41, at 99 ("Many constitutional scholars hoped that . . . the Court [would] finally resolv[e] the *Rummell-Solem-Harmelin* conflict. However, . . . the Court failed to agree on an approach that would clear up the confusion.").

[43] *Lockyer*, 538 U.S. at 72.

[44] WALSH, *supra* note 41, at 103 ("[T]he Court's decision to uphold Ewing's sentence means that Three Strikes defendants will likely be unsuccessful in contesting the constitutionality of their sentences in the future. . . . [unless] the Court . . . change[s] its mind about the standard that should be used to judge the constitutionality of a noncapital sentence."); *see also* Headley, *supra* note 17, at 255 ("It is hard indeed to imagine a fact pattern that would satisfy Kennedy, O'Connor, and Souter's definition of 'grossly disproportionate.'").

[45] *Ewing*, 538 U.S. at 18, 20.

rational expression of legislative judgment regarding the need to incarcerate repeat offenders so as to effectuate incapacitative and deterrent goals.[46]

In the wake of *Lockyer* and *Ewing*, observers agree that "it remains very unclear when the Court will find a prison sentence unconstitutionally disproportionate."[47] Most interested scholars consider this to be an intolerable state of affairs.[48] This is not surprising; these holdings are intuitively troubling. Can it really be the case that life in prison for a handful of property crimes is constitutional? Can it really be the case that such a sentence is not excessive? And if it is in fact excessive, how did we arrive at such an odd place? How is it that a controlling opinion of the Supreme Court can state unequivocally that a principle of proportionality exists under the Eighth Amendment, but nearly all commentators feel justified in concluding that the Court's opinions have rendered proportionality a dead letter?

The roots of the confused state of affairs lay in the divergent methods of interpretation and differing conceptions of constitutional purpose of the shifting factions on the Court.[49] The justices' divergent methods of interpretation mean that, at the very start, there are at least three ways to view the Cruel and Unusual Punishments Clause, each leading to fundamentally different constructions of the Clause's effect. An approach based in originalism posits essentially that there is no evidence that the drafters of the Eighth Amendment (or anyone else at the time) believed that the Amendment would operate to limit a sentence of a term of years.[50] This view is most commonly associated with Justice Scalia's opinion in *Harmelin*.[51] The effect of this approach, shared to some degree by Justice Thomas and other more

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[46] *Id.* at 24–26.

[47] Frase, *supra* note 13, at 574.

[48] *See supra* note 41.

[49] *See* Grossman, *supra* note 9, at 161–62 ("In the wake of . . . *Harmelin*, following the decisions in *Rummel*, *Davis*, and *Solem*, a great deal of confusion exists respecting the application of a proportionality principle to non-capital sentences. Much of that confusion stems from the inability of the Justices to agree upon and articulate clearly an Eighth Amendment proportionality principle, and from the mixed signals they have given with respect to application of such a principle. These problems derive in large part from the Court's failure to develop a convincing philosophical basis on which to premise a meaningful ban on grossly disproportionate punishments.").

[50] *See* Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 170 n.129 (2006) ("Justice Scalia has read the Cruel and Unusual Punishments Clause . . . [to] suggest[] that the phrase 'cruel and unusual' means simply, 'not authorized by law' or 'illegal.'" (citing *Harmelin*, 501 U.S. at 969–75 (analyzing historical evidence and concluding that the Cruel and Unusual Punishments Clause contains no proportionality requirement but instead prohibits punishments not authorized by statute or common law))).

[51] *See id.*

strict textualists,[52] is that the Eighth Amendment is best understood to contain no proportionality requirement at all, "but instead [only] prohibits punishments not authorized by statute or common law."[53]

A non-originalist or non-textualist approach takes a decidedly more expansionist view of what is barred by the Clause—essentially, that the Clause bars sentences that are excessive in relation to the crime or the culpability of the offender. There are two strands of this non-originalist or non-textualist construction: the "narrow" view (commonly associated with Justices O'Connor and Kennedy, and expressed in cases like *Lockyer* and *Ewing*) that a gross disproportionality bar exists, even if it is a bar not easily met by litigants, and the more vigorous view (commonly associated with Justices Stevens and others), which essentially adopts the view of the Court in *Solem* and would act as a strong check on the ability of the legislature to impose punishments that are deemed excessive. The rub, of course, is that the narrow proportionality regime, which prevails today, is generally considered to be an empty shell; it prohibits punishments that are "grossly disproportionate," but almost never leads to the overturning of a sentence of a term of years.[54] This is a classic case of what some have called Justice Kennedy's brand of "Door to Elijah" jurisprudence.[55] Given these interpretive cross-currents, which have split the Court into three seemingly durable factions, the doctrinal confusion arising out of the Proportionality Sextet (where even slim majority opinions were hard to come by) is easy to explain.[56]

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[52] *Id.*

[53] *Id.*

[54] *See supra* note 48; *infra* note 187 and accompanying text.

[55] Supreme Court reporter Dahlia Lithwick summed up Justice Kennedy's tendency to agree in principle with a particular line of reasoning, but to ultimately require facts so specific that it becomes difficult or impossible for plaintiffs to meet the standard:

> Kennedy, in short, look[ed] poised to do that thing he does—close the constitutional door to everyone but Elijah . . . .
>
> This brand of jurisprudence is the Kennedy blue-plate special. He is officially waiting for the perfect facts before he decides environmental cases, racial gerrymandering cases, and possibly voluntary desegregation cases, too. He'll agree with the liberals in theory, agree with the conservatives in specifics, and nobody will know what to do about anything.

Dahlia Lithwick, *Affirmative Inaction*, SLATE, Dec. 4, 2006, http://www.slate.com/id/2154853/.

[56] The best place to see these different strains in action is in *Harmelin*, where the originalists (via Justice Scalia and Chief Justice Rehnquist), won out, the "narrowists" concurred (and set up the decisions in *Ewing* and *Lockyer*), and the non-originalists dissented, harkening back to *Solem*. *Harmelin*, 501 U.S. 957.

Another source of confusion flows from the Court's determination that the Constitution does not mandate any one theory of punishment. This is an often overlooked—but probably more important—problem, because it essentially means that interpretation and application of the Cruel and Unusual Punishments Clause must proceed without any foundational theory.

The Court has refused to read into the Constitution an endorsement of any of the four basic theories of punishment: retribution, deterrence, incapacitation, or rehabilitation.[57] Leaving aside whether this is an instrumentally desirable position, and leaving aside whether it would even be logically possible to erect and administer a regime of punishment based only on one of these theories, this determination—what I call the Non-Preference Doctrine—creates an inescapable stress in the jurisprudence. To the extent that utilitarian theories of punishment do not suggest proportionality in most instances,[58] whereas retributive theories of punishment generally do,[59] the problem becomes apparent. If one takes the position that a given punishment is a rational application of, for instance, general deterrence principles, then it is not immediately clear that proportionality between punishment and crime/culpability is necessary. For example, if the legislature has determined that the interests of society are well-served by imposing a thirty-year sentence for auto theft, which the legislature believes will deter future auto thieves, then there is little room to argue under most accounts that this sentence is "disproportionate" in terms of its deterrent value.[60]

Conversely, if the legislature has determined that a sentence of thirty years for car theft is appropriate, non-utilitarian theories based on desert will have much room to argue that the offender has been over-punished given the relative gravity of the crime committed. The classic example is the "life sentence for traffic violations" thought experiment, first used (I believe) in *Rummel*, where a dissenting Justice Powell noted rather non-controversially that "[a] statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our *felt sense of justice*."[61] This is a retributive argument. Justice Powell, for instance, argued that punishment should not be calibrated in reference to the societal benefit to be gleaned therefrom; rather, a punishment should be calibrated

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[57] *Ewing*, 538 U.S. at 25 ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'" (internal citations omitted)).

[58] *See infra* Part V.

[59] *See infra* Part V.

[60] I will return to the question of whether utilitarian theories necessarily must disclaim proportionality as a general matter. *See infra* Part III.C.

[61] *Rummel*, 445 U.S. at 288 (emphasis added).

(somehow) to the crime/culpability such that it is not "grossly unjust" as an abstract matter.[62]

The Court's adherence to the Non-Preference Doctrine, however justified as a jurisprudential matter, seemingly leaves proportionality theory at a perpetual crossroads: if we look toward utilitarian punishment goals, proportionality seems unnecessary (or at least not required), but if we look towards retributive goals, proportionality is plainly required. It therefore seems true that "[t]he Court's 'proportionality' decisions exert friction upon one another along multiple axes,"[63] and those axes are, fundamentally: (1) conflicting views among Court personnel on proper constitutional interpretive and constructive theory,[64] which leads to basic disagreements over the purpose and effect of the Cruel and Unusual Punishments Clause as a constitutional-interpretive matter, and (2) a commitment to the notion that the Constitution does not prescribe or proscribe any one penological theory, which introduces a fundamental (and indeterminate) variable at the most basic stage of the analysis.[65] What has resulted is what we have today: an unstable regime of "narrow proportionality," which (1) almost never leads to invalidated sentences, (2) is difficult to apply in practice (without troubling levels of instrumentalism),[66] and (3) is unloved (or even particularly liked) by anyone, academics and jurists alike.

III. CHANGING THE TERMS OF THE DEBATE: A NEW MODEL OF PROPORTIONALITY JURISPRUDENCE

Is there a way out? Is it necessarily the case that as long as there remain committed originalists, textualists, and "living constitutionalists," and as long as the Supreme Court remains committed to the Non-Preference Doctrine, proportionality jurisprudence must remain mired in confusion, in theory

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[62] *Id.* at 307. Justice Rehnquist repeated this example by noting in *Rummel* that a proportionality principle might "come into play in the extreme example mentioned by the dissent[] if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 274 n.11. The example has been perpetuated ever since in case law and Eighth Amendment scholarship, sometimes staying true to its "overtime parking" roots and sometimes morphing into "jaywalking." *See, e.g.*, Y. Lee, *Constitutional Right*, supra *note* 16, at 700; Note, *supra* note 13, at 976 ("What if a legislature were to punish parking violations with life in prison?").

[63] O'Shea, *supra* note 41, at 1044.

[64] *See supra* Part II.

[65] *See supra* Part II.

[66] *Ewing*, 538 U.S. at 27 ("We do not sit as a 'superlegislature' to second-guess these policy choices. It is enough that [a state have] a reasonable basis for believing that [sentences] enhance the goals of [its] criminal justice system in any substantial way.").

prohibiting excessive custodial sentences, but in practice never actually striking them down? As the name of this section implies, I think there is a place for proportionality under the Eighth Amendment if one evaluates the term "proportionality" in light of the purpose of the Eighth Amendment, which the Supreme Court has recognized is the protection of human dignity.[67]

Some background is in order. To understand how the concept of human dignity weighs on the subject of proportionality, the very concept of "punishment" must be broken down into its constituent components: the "qualitative" component, which is the actual punishment imposed (including the conditions under which it is imposed), and the "quantitative" component, which is the frequency of the punishment imposed or the length of time it remains imposed upon the individual. So, if an individual is sentenced to twenty years hard labor, the quantitative component is the "twenty years," and the basic qualitative component is the "hard labor," along with the incarceration that necessarily goes along with it.[68] If an individual is sentenced to one year incarceration and five years probation, the qualitative components are, respectively, the incarceration, and the probation, and the quantitative components are one year incarceration and five years probation.[69]

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[67] *See supra* note 28.

[68] As noted above, there is much more that goes into the "qualitative component" than simply the "hard labor;" the qualitative component of the punishment consists of *all* the conditions of the punishment experienced by the individual. This will be discussed in more detail in Part III.A, *infra*.

[69] A possible third component of a punishment would be a "collateral component"—the fallout, if you will, from the fact that a punishment has in fact been imposed. This can be analogized to (but is distinct from) the collateral consequences of a conviction. So, for a sentence of ten days community service, the qualitative component would be the community service, the quantitative component would be the ten days, and the "collateral component" of the punishment would be, for instance, any consequences attached to having been so sentenced—for instance, the stigma of being seen in your neighborhood being punished for a crime, thereby signaling to your community that you are a criminal, time missed from work (and resultant loss of income), etc.

With the steadily increasing acceptance and institution of shaming punishments, an appreciation for the collateral component of a punishment is important. Nevertheless, I will focus here on the core components of punishment: the qualitative component and the quantitative component. While more exploration is perhaps needed, it is my view at this point that accounting for the collateral component of a punishment is probably not an appropriate exercise for an Eighth Amendment proportionality regime, primarily because any collateral component of a punishment is not under the control of the sentencing entity; if it was, the collateral component would be properly considered as part of the quantitative component. I should admit that I could probably be convinced otherwise.

Simple enough. However, I part ways with most commentators because, as set out below, I posit that the best view of the Cruel and Unusual Punishments Clause is that proportionality is required *only* between the qualitative component of the punishment and the crime committed (or the culpability of the offender, or both), but *not* between the quantitative component and the crime committed (and/or the culpability of the offender). In other words, the Eighth Amendment does not prohibit punishments that are quantitatively excessive in relation to the crime committed and/or the culpability of the offender. Rather, the Eighth Amendment requires only that the method of punishment chosen, and the way in which that punishment is enacted (and experienced by the punishee) not be excessive in relation to the crime committed and/or the culpability of the offender. The reason I believe this model is preferable to the "strong," "weak," or "no" proportionality models that have been debated for years is that this model bars punishments that are unnecessarily cruel or degrading, and emphasizes (and incorporates) the core function of the Eighth Amendment as enunciated by the Supreme Court: the protection of human dignity.[70]

This normative model avoids the inconsistencies (the "schizophrenia," if you will)[71] of current approaches, because it does not impose an artificial and subjective proportionality on the length of custodial sentences. It does, however, recognize that there are some punishments whose methods are so odious as to be disproportional to any crime committed—something that courts already recognize regularly.

A. *Qualitative and Quantitative Proportionality*

As discussed above, "qualitative proportionality" refers to the proportionality, under any theory, of the crime committed (or the culpability of the offender, or both) and the non-durative conditions of the punishment imposed. Qualitative proportionality is concerned with what is actually done to the individual: a sentence of incarceration, corporal punishment, execution, etc. The concept also encompasses the conditions under which the punishment is imposed. For instance, the qualitative aspects of a prison sentence include not only the fact of being imprisoned, but all the elements that go into being incarcerated: medical care, hygiene, diet, safety, and so forth. Similarly, for capital punishment, qualitative proportionality encompasses the type of execution imposed—electrocution, firing squad, lethal injection, etc.—and the conditions under which that particular method is exacted upon the individual (e.g. the particular drug cocktails used for lethal injection). These qualitative conditions are then balanced against the

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[70] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[71] *See supra* note 31.

crime committed, the culpability of the offender, or both, in order to arrive at a determination as to whether there is proportionality, or at least not gross disproportionality.

"Quantitative proportionality," on the other hand, refers to the proportionality, under any theory, between the crime committed (or the culpability of the offender, or both) and the length or frequency of the sentence imposed. Most salient would be the length of the custodial sentence subjecting the individual to incarceration. The concept also applies to the length or duration of non-custodial sentences like probation or community service. The concept also encapsulates the frequency of punishment—for instance, the number of lashings imposed.[72] For example, the quantitative proportionality of a sentence of ten years in prison for automobile theft would be the proportionality between the crime of car theft (or the culpability of the offender, or both) and the fact that the given punishment imposed will be of ten years' duration; it is *not* the fact that a prison sentence is imposed at all (which is a qualitative component). Of course, there can be, and often will be, multiple distinct quantitative components to a sentence because of non-custodial supervision following incarceration (probation, registration, etc.). So, evaluating the quantitative proportionality of a sentence of ten years incarceration and ten years probation for car theft would require accounting for both the length of the prison term and the length of the probationary term.[73]

B. *Quantitative Proportionality Is Not Required by the Eighth Amendment*

Assuming that punishments have two fundamental components, the question is whether the Cruel and Unusual Punishments Clause should be read to prohibit punishments that are not qualitatively and/or quantitatively proportional to the crime (or the culpability of the offender, or both). I assume for purposes of this Article that the Clause does require qualitative proportionality, given the Amendment's basic role as a guarantor of personal dignity, which acts as a limit on the qualitative aspects of a punishment.[74] This assumption proceeds in part from the belief that courts have, in effect,

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[72] *See infra* Part III.B.2.

[73] Not all would agree that there is a neat division between quantitative and qualitative punishment as experienced by the individual. *See, e.g.*, Ristroph, *Sexual Punishments*, *supra* note 50, at 161 (questioning the traditional "legal construction of punishment that has rendered the law blind to the . . . corporal aspects of incarceration").

[74] This, of course, leads to interesting questions regarding the death penalty. Can it be the case that physical impositions short of death can be disproportionate to any crime, but execution cannot be?

determined that certain punishments are always qualitatively disproportionate to any crime or any degree of culpability. For instance, courts will uniformly find that physical torture (like the rack and screw) are violations of the Eighth Amendment. In other words, punishments with such qualitative characteristics are necessarily disproportionate to the crime/culpability under any penological theory.

The more pressing question, for purposes of proportionality jurisprudence—and the question that has vexed courts—is whether the Clause requires *quantitative* proportionality. I address that question in this section, working through textual, originalist, and purposive arguments.

1. *Text of the Cruel and Unusual Punishments Clause*

The notion that courts should be required to strike down quantitatively disproportional punishments is difficult to reconcile with the text of the Eighth Amendment, which provides that "cruel and unusual punishments [shall not be] inflicted."[75] Of course, there is no explicit requirement in the Clause that a punishment be "proportional" to the crime committed (or to the culpability of the offender),[76] or even that the punishment imposed not be "excessive."[77] The question, then, is whether one can persuasively draw the conclusion that excessively long (i.e. quantitatively disproportional) punishments are inherently "cruel" and/or "unusual" as those terms might be reasonably defined.[78]

The logical first question is whether it is significant as a matter of textual interpretation that the drafters could have—but did not—explicitly bar "excessive" punishments, using that term. Many have argued that it is not

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[75] U.S. CONST. amend. VIII.

[76] *See id.*

[77] *See id.*

[78] I leave as beyond the scope of this article whether the Cruel *and* Unusual Punishments Clause can or should be read disjunctively, a topic upon which consensus has not emerged. *See, e.g.*, Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 855–59 (1969) (arguing that the use of the word "unusual" in the English Bill of Rights was due to chance or sloppy draftsmanship); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 991 n.8 (1978); *see also* Furman v. Georgia, 408 U.S. 238, 276–77 n.20 (1972) ("The question [whether the word 'unusual' has meaning distinct from 'cruel'] . . . is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words."). *But see* United States v. Polizzi, 549 F. Supp. 2d 308, 320 (E.D.N.Y. 2008) ("it cannot be said that the statute is unconstitutional because it is not both cruel *and* unusual"); Stinneford, *supra* note 13, at 1747, 1770 (arguing that the word "unusual" was a term of art that referred to government practices that deviate from "long usage").

significant. Justice Stevens observed in *Ewing* that "[i]t would be anomalous indeed to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment."[79] Many others have made similar arguments; perhaps the earliest was Benjamin Oliver in 1832, who observed that, as a textual matter, while "no express restriction is laid . . . upon the power of imprisoning for crimes," it is nevertheless the case that quantitatively disproportionate punishments would be "contrary to the spirit of the [C]onstitution" when viewed with respect to the Excessive Fines Clause.[80]

These observers do not give sufficient respect to this textual distinction. They see two different texts and pronounce them the same. That is anomalous. Under what theory of statutory construction would one read the three clauses of the Eighth Amendment as meaning the same thing when the text is so clearly different?[81] The amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed."[82] The term "excessive," by its nature, implies a measure of proportionality,[83] and as such it is perfectly appropriate that courts can (and do) make what is, in effect, a modified quantitative proportionality decision when determining whether a given bail or fine is "too high."[84] The text plainly demands it. But the term

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[79] Ewing v. California, 538 U.S. 11, 33 (2003) (quoting Solem v. Helm, 463 U.S. 277, 289 (1983)).

[80] Note, *supra* note 13, at 980 (citing BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 185 (1832)).

[81] *See* Laurence Claus, *The Anti-Discrimination Eighth Amendment,* 28 HARV. J. L. & PUB. POL'Y 119, 120 (2005) ("It is the *text* of the amendment that seems 'anomalous indeed.' If that text were meant simply to condemn *excessive* punishment, why does it not say so? The term 'excessive' was, after all, on the tips of the drafters' tongues, for they used it in respect of bail and fines. Why was it not deployed more generally?").

Professor Claus ultimately comes to a different conclusion about the purpose of the Cruel and Unusual Punishments Clause. In his view, "[h]istory resolves the Eighth Amendment's linguistic anomaly by revealing that the amendment was meant to address a problem distinct from excessive punishment or vicious punishment. That problem was *discriminatory* punishment. The principle that lies behind the Eighth Amendment is non-discrimination. The Eighth Amendment is a founding-era expression of equal protection." *Id.* at 121.

[82] U.S. CONST. amend. VIII.

[83] 5 OXFORD ENGLISH DICTIONARY 501 (2d ed. 1989) (defining "excessive" as "[e]xceeding what is right, proportionate, or desirable; immoderate, inordinate, extravagant").

[84] Of course, these determinations are cabined by certain criteria—for instance, bail is calculated in reference to the risk of flight or the gravity of the crime. *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 5 (1951) ("[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.

"excessive" is not repeated in the third sub-clause. While this distinction may seem facile to some, it is surely significant. At the very least, one must posit that the set of punishments meant to qualify as "cruel and unusual" is different from the set that would be "excessive."[85] To believe otherwise is to ignore the text altogether—an unprincipled position under any interpretive method. The question then becomes whether the set of quantitatively "excessive" punishments is necessarily contained within the set of "cruel and unusual" punishments."[86] For reasons discussed in Part IV below, I do not believe that to be the case.[87]

The best interpretation of the text on its face is that the Bail Clause and the Fines Clause direct courts to engage in an examination of the "quantitative proportionality" between the amount of the bail or fine and the counterbalanced wrongdoing (or risk of flight). The conspicuous absence of the term "excessive" from the Cruel and Unusual Punishments Clause is a strong textual clue that there is no quantitative proportionality requirement.

2. *The Argument from Originalism: Early History of the Cruel and Unusual Punishments Clause*

Original understandings of the Clause offer some support to this textual argument, although the evidence is mixed.[88] Scholars agree that "[t]he English Bill of Rights of 1689 is recognized as the template followed by the

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The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant.") (citing FED. R. CRIM. P. 46(c) ("[T]he amount [of bail] shall be such as [to] insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.")).

[85] A complicating factor in this analysis is that while the Bail and Fines Clauses deal only with one "medium" (money), the Cruel and Unusual Punishments Clause necessarily must cover myriad punishments: incarceration, corporal punishment, compulsory service, shamings, etc.

[86] Y. Lee, *Constitutional Right*, *supra* note 16, at 680 ("[T]he proposition that 'cruel and unusual' and 'excessive' are different does not imply that one cannot be a subset of the other.").

[87] A district court recently made this point explicitly. *Polizzi*, 549 F. Supp. 2d at 359 ("[S]uffice it to say that in terms of imposing punishment, a sentence of imprisonment for five years is not necessarily constitutionally 'cruel,' however excessive it might seem to the laity in the context of a particular case.").

[88] I should note at the outset that extended treatments of the original meaning of the Cruel and Unusual Punishments Clause have been made, and I do not seek to duplicate those efforts here. *See, e.g.*, Granucci, *supra* note 78, at 840; Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661 (2004); *see also* Harmelin v. Michigan, 501 U.S. 957, 961–94 (1991).

Eighth Amendment's drafters."[89] Further, "several early American statutes also included . . . protections against unreasonable punishments,"[90] and those laws "likely influenced the [Eighth] Amendment's final composition."[91] An inspection of the most prominent of those early statutes provides some evidence that, at the time of the drafting, a distinction was understood between "cruel" and "excessive" punishments.

For instance, the first legal code established in America, the Massachusetts Bay Colony's Body of Liberties, drafted "'to guide the magistrates' in the administration of their office,"[92] contained three prohibitions against severe punishments:

- Clause 43: "No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equall to a gentleman be punished with whipping, unles his crime be very shamefull, and his course of life vitious and profligate." [93]
- Clause 45: "No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capital case where he is first fullie convicted by cleare and suffitient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane."[94]

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[89] Catherine Rylyk, Note, *Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, 16 WM. & MARY BILL RTS. J. 1305, 1308 (2008). As the Court noted in *Ingraham v. Wright*, the English Bill of Rights contains a preamble, portions of which are interesting for our purposes:

> WHEREAS the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate . . . the laws and liberties of this kingdom . . . And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects . . . And excessive fines have been imposed; and illegal and cruel punishments inflicted . . . .

Ingraham v. Wright, 430 U.S. 651, 665 n.33 (1977) (citing SOURCES OF OUR LIBERTIES 24546 (Richard L. Perry ed., 1959)).

[90] Rylyk, *supra* note 89, at 1308.

[91] *Id.*

[92] *Id.* at 1309.

[93] MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* SOURCES OF OUR LIBERTIES 148, 153 (Richard L. Perry ed., 1959).

[94] *Id.*

- Clause 46: "For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel."[95]

Clauses 45 and 46 seem to be direct limitations on the *quality* of punishments that can be imposed; "[b]arbarous and inhumane" tortures and other "cruel" punishments are outlawed. Clause 43, in contrast, imposes an explicit quantitative restriction; whips are limited to forty.[96] Significantly, the Cruel and Unusual Punishments Clause of the Eighth Amendment echoes the construction of Clauses 45 and 46 (generally prohibiting qualitatively cruel punishments), but not the construction of Clause 43, with its explicit quantitative ceiling.

The 1776 Virginia Declaration of Rights borrows more directly from the English Bill of Rights,[97] using language that would be imported essentially whole cloth into the Eighth Amendment:[98] "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[99]

Scholars have suggested that the Virginia drafters' intent in importing the English Bill of Rights provision stemmed from a desire on the part of the American founders to do whatever it was that the English had done.[100] Namely, in the words of Patrick Henry, "What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment."[101] Indeed, the Bill of Rights-less Constitution was criticized on the grounds of the "absence of a provision restraining Congress in its power

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[95] *Id.*

[96] *See supra* Part III.A (defining quantitative proportionality in terms of "frequency" of punishment).

[97] Rylyk, *supra* note 89, at 1310 ("George Mason copied the exact language of the tenth section of the English Bill of Rights of 1689.").

[98] *Ingraham*, 430 U.S. at 664 ("The text [of the Eighth Amendment] was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689.").

[99] VIRGINIA DECLARATION OF RIGHTS AND CONSTITUTION (1776), *reprinted in* THE ESSENTIAL BILL OF RIGHTS 188, 189 (Gordon Lloyd & Margie Lloyd eds., 1998)

[100] *See* Claus, *Anti-Discrimination*, *supra* note 81, at 127 ("The colonists' choice to describe their declarations of rights as 'bills of rights' pointed to a shared English source and signaled that where the American founders appropriated the language of the source, they sought to adopt the *meaning* of the source.").

[101] Some suggest that this importation of English terminology brought with it the English concept of proportionality. *See* Rylyk, *supra* note 89, at 1313 ("[T]he Court suggested that the Framers 'also adopted the English principle of proportionality' when incorporating language from the English Bill of Rights.").

to determine '*what kind of punishments* shall be inflicted on persons convicted of crimes.'"[102]

Unfortunately for us, there was little mention of the Eighth Amendment during the ratification debates in Congress, and so we can draw only limited first-hand conclusions as to the intent of the voting body (to the extent the intent of a voting body can ever rationally be understood).[103] What scant evidence does exist from the debates offers some support—albeit weak—that the Clause was intended to only prohibit certain "forms" of punishment:

> Very little was said concerning the meaning of the Eighth Amendment during the Congressional debates. Indeed, there were only two comments. One comment noted that it was troublesome because it might prohibit certain acceptable forms of punishment for crimes and the other that the meaning of the amendment was so vague as to mean nothing. [104]

To the extent one can draw any conclusions at all from the brief ratification debates, one might suggest that the concern about the limitation on form of punishment meant that the proposed Amendment was indeed understood to act as a limit on the qualitative character (the "form") of available punishments.[105] However, given the thin evidence, any conclusions are necessarily uncertain.[106]

The same is true regarding state constitutional provisions adopted around the time of the ratification. Some of these contained express proportionality provisions.[107] These provisions have appeared to some—including Justice

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[102] *Ingraham*, 430 U.S. at 666 n.35 (emphasis added) (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 111 (1876) (comments of Abraham Holmes)).

[103] Rumann, *supra* note 88, at 673–79.

[104] *Id.* at 679 (quoting 1 Annals of Cong. 782–83 (Joseph Gales ed., 1789)).

[105] *See, e.g.*, Davis v. Berry, 216 F. 413, 417 (1914) ("No doubt delegates to the conventions, in providing against cruel punishment, had largely in mind what Blackstone had then recently written, in volume 4, page 376, such as being drawn or dragged to the place of execution, emboweling alive, cutting off the hands or ears, branding on the face or hand, slitting the nostrils, placing the prisoner in the pillory, the ducking, the rack, and the torture, and, as in Spanish countries, crucifying.").

[106] Justice Thurgood Marshall noted the historical confusion in his *Furman v. Georgia* concurrence, where he stated that "[w]hether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eight Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments." *Furman*, 408 U.S. at 319 (Marshall, J., concurring).

[107] *See* N.H. BILL OF RIGHTS art. XVIII (adopted 1792); OHIO CONST. OF 1802, art. VIII, § 14.

Scalia—as proof that the lack of such an express provision in the federal Constitution indicates a rejection by the Framers of proportionality principles.[108] However, there really is no persuasive evidence that the federal drafters were aware of these state provisions, or that they consciously rejected inclusion of similar language.

Early case law is similarly indeterminate on the question of original intent.[109] The early Supreme Court cases applying the Clause limited its application to "tortures," explicitly holding that "cruel" punishments were those that applied "inhuman techniques."[110] "It suffices to note that the primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment."[111] An early prominent dissent by Justice Field in *O'Neil v. Vermont*[112]—often cited by scholars (and courts)[113] as support for a deeply-rooted commitment on the part of early American courts to quantitative proportionality—actually makes no such claim. In *O'Neil*, the defendant was convicted in state court of "307 offenses of selling intoxicating liquors without authority"[114] and he was fined:

> $6,140, . . . the costs of prosecution, taxed at $497.96, and stand committed until the sentence should be complied with; and that, if the said fine and costs . . . should not be paid before [approximately 4 months hence], he should be confined at hard labor in the house of correction at Rutland for the term of 19,914 days . . . [115]

or about fifty-five years. The majority's decision upholding the sentence concerned itself primarily with jurisdictional issues, but a large portion of Justice Field's lengthy dissent objects to the structure of the sentence. He noted that the Amendment's "inhibition is directed, not only against punishments of the character mentioned, but against all punishments which

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[108] *Harmelin*, 501 U.S. at 976–77.

[109] The early case law really is not all that early; the Supreme Court did not squarely interpret the Cruel and Unusual Punishments Clause for the first time until *Wilkerson v. Utah* in 1879, more than one hundred years after ratification. 99 U.S. 130 (1879).

[110] *Id.* at 136 ("[I]t is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . . .").

[111] Estelle v. Gamble, 429 U.S. 97, 102 (1976).

[112] O'Neil v. Vermont, 144 U.S. 323, 337 (1892).

[113] *See, e.g.*, Weems v. United States, 217 U.S. 349, 371 (1910) (quoting *O'Neil*, 144 U.S. at 339–40 (Field, J., dissenting)) (The Clause is "directed not only against punishments which inflict torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.'").

[114] *O'Neil*, 144 U.S. at 330.

[115] *Id.*

by their excessive length or severity are greatly disproportioned to the offenses charged."[116] However, the unique facts of the case vitiate the power of Justice Field's proclamation regarding quantitative proportionality. Justice Field's dissent is animated primarily by a concern about the dubious method of charging over three hundred separate offenses for what amounted to one crime.[117] This, of course, is a problem distinct from that of over-punishing for one offense, which is what the modern proportionality debate is about. In effect, what Justice Field was concerned with was not quantitative proportionality in the strictest sense, but a method of charging that seemed patently unfair and effectively acted to subvert the will of the legislature by attaching huge penalties to one criminal act by virtue of a charging gimmick.

Nevertheless, some early cases drew upon Justice Field's dissent in *O'Neil* to analyze sentence length in reference to the severity of the crime committed.[118] Again, though, it is not clear that these cases were concerned exclusively—or even primarily—with quantitative proportionality.[119] This is vividly seen in *Weems*, decided in 1910, where the Court struck down as disproportionate a sentence of fifteen years of "hard and painful labor," shackling from wrist to ankles at all times, a fine, and other monitoring and disqualifying punishments,[120] all for a fairly minor accounting fraud.[121]

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[116] *Id.* at 339–40.

[117] *Id.* at 340 ("The State may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass, and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration.").

[118] Rylyk, *supra* note 89, at 1313; *see also Davis*, 216 F. at 417 ("Usually the length of imprisonment following a conviction is within the discretion of the legislative body, and we have an extreme case in [*O'Neil*], in which . . . quite a per cent. of the bar of the country are of the opinion that the dissenting opinion by Justice Field . . . was the stronger."); *Ex parte* Karlson, 160 Cal. 378, 383 (1911) ("The danger that persons may be imprisoned for an unlimited period for non-payment of a fine for contempt is, as we think, completely removed by the constitutional guaranty that, 'excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted.'") (quoting CAL. CONST. art. I, § 6); State v. Ross, 55 Or. 450, 474 (1909) (striking down "excessive" sentence for unlawful conversion imposing imprisonment until half-million dollar fine was paid; finding this tantamount to life imprisonment).

[119] *See, e.g.*, *Davis*, 216 F. at 417 (invalidating sentence of castration).

[120] *Weems*, 217 U.S. at 364. These punishments included "[c]ivil interdiction [which] shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos* . . . fixing his domicil and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority, in writing." *Id.*

While many (including the Supreme Court itself) have cited *Weems* for the prospect that an excessive term of years is unconstitutional,[122] a close reading of *Weems* reveals that the Court in fact objected primarily to the qualitative component of the punishment—hard labor, shackling, and so forth. To the extent *Weems* is seen as a strong early endorsement of quantitative proportionality, that view is questionable at best, mistaken at worst.

Ultimately, the most we can confidently say about the intentions of the drafters and the early case history is that "[i]n its most straightforward and historically contextualized reading, the Eighth Amendment [wa]s recognized as protecting against 'inhumane, [b]arbarous, or cruel' treatment"[123]—a conclusion consistent with a qualitative proportionality requirement, but no more. Conclusions drawn further—particularly conclusions regarding quantitative proportionality—are unsupported by the historical record or early case law.

IV. A DIGNITY-BASED APPROACH TO EIGHTH AMENDMENT PROPORTIONALITY

So, where does that leave us? In the preceding section, I have put forth a particular reading of the text, and offered a brief recounting of original intent and understanding. Ultimately, the text is susceptible to two reasonable interpretations as it relates to quantitative proportionality: first, that a punishment consisting of a term of years that is "excessive" in relation to the crime committed or the culpability of the offender (under either utilitarian or retributivist theory) is not necessarily "cruel and unusual," and therefore the Clause generally does not act as a limit on the temporal length of a sentence. Second, it would essentially be "cruel" to imprison someone for longer than is deserved. Therefore, the Clause—properly understood—acts as a limit on the length of custodial sentences, because excessive sentences (presumably under any of the theories of punishment) are cruel, and therefore prohibited. This is the view that most scholars and jurists have accepted.[124] Further, as I

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[121] *Id.* at 357–58.

[122] *See* Y. Lee, *Constitutional Right*, *supra* note 16, at 730 n.246 (describing *Weems* as "the seminal excessiveness case dealing with a noncapital sentence").

[123] Rylyk, *supra* note 89, at 1311.

[124] Those accepting this second view have not, to my mind, offered a compelling justification for why an excessive quantitative sentence is "unusual." Suffice it to say that sentences that seem too long in relation to the crime committed are nothing new in American jurisprudence, and certainly should not strike anyone as "unusual."

However, descriptive and normative accounts of the place of "unusual" in the jurisprudence have been lacking. *See* Stinneford, *supra* note 13, at 1744 (arguing that the

have outlined above, originalist accounts are of limited value; the historical evidence of original intent and public meaning is mixed (if anything, this is evidence supportive of my thesis), and one should be loathe to draw solid conclusions therefrom.

How does one break the tie, if you will, between these readings of the Clause? Assuming that both are superficially plausible, and assuming that limited pre-ratification history and early post-ratification case law is of limited guidance,[125] how should one determine whether the Cruel and Unusual Punishments Clause does or does not (or should or should not) constrain the quantitative component of a punishment?

I should note here that I do not generally consider myself a textualist or originalist as those terms are commonly understood. However, I do think the textualist argument has special salience here, for two primary reasons. First, as discussed above, when dealing with an Eighth Amendment that seems to make a clear distinction between the terms "excessive" and "cruel and unusual," I think special regard must be given to the vagaries of the text.[126] Second, given the "mess" of proportionality jurisprudence, which I attribute in large part to attempts to make the Eighth Amendment say something that it doesn't, I think a promising avenue for clarifying matters is a return to a focus on the text. Ultimately, though, like any other constitutional issue, when the text is susceptible to multiple plausible readings, we must turn to the values underlying the particular provision to determine what exactly the text is trying to accomplish. This is the issue to which I turn in this section.

As the Supreme Court has held, and as these sections will discuss, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[127] In other words, the Cruel and Unusual Punishments Clause is meant to protect individuals from punishments that are unduly

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meaning of the word unusual has largely been ignored by both the "originalist" and "evolutionist" members of the Supreme Court, some of whom have occasionally ventured an opinion as to the word's meaning (or lack thereof), but all of whom have ignored the word in practice; scholars have also generally ignored the word in their treatment of the Cruel and Unusual Punishments Clause). Perhaps the best justification for finding long custodial sentences "unusual" is that, generally, policies should be calibrated to effectuate their purpose, and it would be unusual to insist on continuing a policy (in this case, further incarceration) after its purpose (of, say, rehabilitating or deterring a prisoner) has been fulfilled. Query whether this is in any sense an "unusual" occurrence in the American system of society, governance, and punishment. Such a phenomenon is probably better described as undesirable, not unusual. *Cf.* JONATHAN RAUCH, DEMOSCLEROSIS 132 (1994) ("[It] is scarcely an exaggeration to say that, in Washington, *every program lasts forever.*").

[125] *See supra* Part II.

[126] *See supra* Parts III.A. & III.B.

[127] Trop v. Dulles, 356 U.S. 86, 100 (1958).

violative of their inherent dignity as human beings. Therefore, if the Cruel and Unusual Punishments Clause is to be primarily concerned with the protection of human dignity, it becomes harder to justify a proportionality regime that mandates quantitative proportionality between the crime committed (and/or the culpability of the offender) and the sentence imposed, because there is not necessarily an obvious connection between the temporal length of a sentence and the impact on the dignity of the offender.

A. *Human Dignity Under the Eighth Amendment*

To appreciate how conceptions of dignity weigh on how we should think about Eighth Amendment proportionality, it is worth recounting first how dignity as a concept has been understood to impact constitutional law in general, and Eighth Amendment jurisprudence in particular.

At the most basic level, dignity's place in legal thought—and the American constitutional order in particular—is unevenly understood.[128] While the concept has always existed on the periphery of constitutional theory and doctrine,[129] especially for politically contentious issues touching on privacy, health, and human life,[130] it is only fairly recently that serious, substantial efforts have been made to explore dignity's role in the larger

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[128] *See* GEORGE W. HARRIS, DIGNITY AND VULNERABILITY 1 (1997) ("Moralists of various sorts use the terms 'human dignity' and 'human worth' often, but frequently these words have little more than rhetorical effect, even among professional philosophers. The fact is that we have a fairly vague concept of human worth and dignity, though there is a core that is instructive."); Denise G. Réaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEENS L.J. 61, 62 (2002) ("[D]ignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers.").

[129] John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 676.

[130] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding in the context of consensual homosexual relations, "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons .... The liberty protected by the Constitution allows homosexual persons the right to make this choice."); United States v. Balsys, 524 U.S. 666, 713 (1998) (Breyer, J., dissenting) (discussing "the insult to human dignity [] created when a person" is forced to self-incriminate); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 958 (2009) (critiquing the use of dignity as an independent justification for free-speech protection, noting that articulations of a dignity rationale are either so broad as to threaten restriction of speech, or are subsumed under the "argument from autonomy").

American constitutional structure.[131] This lack of attention has been attributed by some to be a function of American rights-based constitutionalism, which is argued to be an unnatural fit with a value-based conception of human dignity.[132] This perspective may have some validity; certainly, the American focus on individual rights when contrasted with the more "social" orientation of post-war European constitutionalism lends support to this claim.[133] Others have offered more mundane accounts of dignity's historical absence in American constitutionalism; these accounts suggest that the inherent slipperiness of dignity as an analytical concept is primarily to blame for its relative absence in American constitutional theory and application, and that until human dignity as a theoretical matter is better understood, practical application will concomitantly lag.[134] In any event, while the scholarship on the precise boundaries of the dignity interest under

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[131] *See, e.g.*, Castiglione, *supra* note 129, at 655–62 (exploring the place of human dignity in search and seizure jurisprudence, and advocating for explicit recognition of the concept in Court's reasonableness analysis); Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 509 (2004) ("Our Constitution is a charter of human rights, dignity and self-determination."); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 757–89 (2006) (canvassing the Supreme Court's invocation of dignity in various constitutional settings).

[132] Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, *in* 37 EUROPEAN AND U.S. CONSTITUTIONALISM, SCIENCE AND TECHNIQUE OF DEMOCRACY 75, 89 (Georg Nolte ed., 2005) ("[T]he U.S. Constitution, as interpreted by the Supreme Court, seems to offer less protection to values and rights associated with the idea of human dignity than the average European Constitution. Even at the level of ordinary legislation these rights and values appear to enjoy a lesser standing in America."); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202–05 (2008) (arguing that the value-based models of human dignity prevalent in European constitutionalism are inappropriate for rights-based American constitutionalism).

[133] *See, e.g.*, Bognetti, *supra* note 132, at 88 (exploring the concept of dignity in European systems, and noting the "minimal (if any) role played by the concept of human dignity in U.S. law").

Some notable efforts have been made to better explain the role of dignity in the American system. *See, e.g.*, Louis Henkin, *Human Dignity and Constitutional Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210 (M.J. Meyer & W.A. Parent eds., 1992).

[134] *See* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 528–31 (2006); *see also* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 656 (2008) ("But what does dignity mean in these contexts? Can it be a basis for human rights . . . or is it simply a synonym for human rights? In particular, what role does the concept of dignity play in the context of human rights adjudication?").

the United States Constitution is underdeveloped,[135] a few principles have gained some measure of acceptance. One of those principles is that "constitutional dignity," whatever it is, stands in contrast to concepts like brutality, degradation, or other "uncivilized or barbarous behavior."[136] This conception is consonant with the understanding of the Cruel and Unusual Punishments Clause outlined here, which indisputably "rests upon fundamental considerations of human decency."[137]

In contrast to the broader constitutional order, dignity actually has a relatively well-established place in Eighth Amendment jurisprudence. The idea that "[t]he Eighth Amendment rests up on fundamental considerations of human decency"[138] has never really been challenged. There is general agreement that the Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures."[139] Of course, the practical effect of the Amendment has changed over time. The Clause has always been understood to bar "the ducking stool, . . . the whipping post, the pillory, mutilation, and

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[135] *See* Castiglione, *supra* note 129, at 676 (citing Réaume, *supra* note 128, at 62 ("[D]ignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers."); *see also* Erin Daly, *Constitutional Dignity: Lessons from Home and Abroad* (Widener Law Sch. Legal Studies Res. Paper Series, Paper No. 08-07, 2007) (surveying American and foreign case law on "institutional" and individual dignity, and arguing that across all constitutional provisions, the Supreme Court has often referred to, and at times relied on, dignity, but that "defining it and understanding it have almost completely escaped the Court's grasp").

[136] Wright, *supra* note 134, at 534 (arguing that dignity is best understood as standing in contrast to concepts like brutality, cruelty, humiliation, barbarity, etc.); *see also* Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2125 (2001) ("[O]ffenses against dignity involve a failure to show people the respect and deference to which they are entitled by virtue of their intrinsic humanity.").

[137] RUDOVSKY, *supra* note 6, at 1; *see also* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (The Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures." (internal quotation omitted)); Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 110 (2008) [hereinafter Y. Lee, *Desert*] (identifying "cruelty, sadism, inhumanity, and . . . racial hatred and prejudice" as "impulses that [] have no place in our . . . criminal justice system").

[138] RUDOVSKY, *supra* note 6, at 1.

[139] *Gamble*, 429 U.S. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); *see* Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV. 559, 581 (2003) ("It is appropriate . . . to look at the Eighth Amendment not as a proscription of procedure but as a mandate for recognition and protection of human dignity."); Rylyk, *supra* note 89, at 1311 ("Restated, all punishments must 'comport[] with human dignity . . . .'").

execution for anything but the most serious offenses."[140] As the jurisprudence settled on the oft-controversial "evolving standards of decency" test,[141] a concern for the dignity of the individual—which lies at the heart of being "decent"[142]—became the conceptual engine that powered the progression of the doctrine. As that model would have it, as society advances and, presumably, becomes more enlightened, the appreciation of the dignity of the person becomes more acute, and the punishments that may be meted out, accordingly, become increasingly circumscribed.[143] A voluminous literature has correspondingly arisen noting the "dehumanizing" effect of American incarceration and advocating for an increased responsiveness by courts to these dignitary harms.[144]

This concern for human dignity as expressed in Eighth Amendment law is perhaps most clearly demonstrated in the cases concerning the conditions of inmate confinement, encompassing not only the physical conditions of facilities, but the availability of medical services, tolerance of violence, and interactions between staff and inmates. For instance, concern for the dignity of the person lies at the core of the prohibition against excessive force. "After incarceration, . . . the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth

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[140] Stinneford, *supra* note 13, at 1819.

[141] *Trop*, 356 U.S. at 101.

[142] *See supra* note 137 and accompanying text.

[143] Of course, there are limits to how this can work in reality; taken to its logical extreme, all punishment could someday be considered violative of human dignity. *See* Gilreath, *supra* note 139, at 579 n.87 ("South Africa's Attorney General has argued that all punishment is an impairment of human dignity, noting the restriction of movement and expression concomitant with a prison sentence are severe infringements of dignity.") (internal citations omitted). Of course, no society could long survive (in recognizable form, anyway) without imposing punishment upon violators of law.

However, compelling arguments have been made that, in the last few decades, the United States has actually *regressed* when it comes to the willingness to impose punishments on individuals convicted of crimes, which may betray a lessening concern for the dignity of the person amongst courts and the populace. Haney, *supra* note 8, at 505 ("[P]rison pain is not only widespread but has become the raison d'être of American corrections."); Nilsen, *supra* note 13, at 116 ("[T]he prison experience is, in many ways, harsher than it has ever been."); Whitman, *supra* note 8, at 85–87. Some, as mentioned above, have tied this to the widespread acceptance of retributivism. *See id.* To the extent one believes this regression to be true, it casts doubt on the common notion that the "evolving standards of decency" test inexorably leads to punishments more respectful of human dignity.

[144] *See, e.g.*, Nilsen, *supra* note 13, at 130–34, 140 (decrying the Supreme Court's erection of procedural hurdles that undermine the "Eighth Amendment guarantees [that] every citizen [has] a right of human dignity against which all sentences should be assessed.").

Amendment."[145] To determine whether the pain inflicted upon a prisoner was unnecessary and wanton, courts will generally consider "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[146] The fact that significant injury is not necessary to establish a claim for excessive force (so long as the force was applied maliciously) stems from the recognition that the malicious use of force to cause harm constitutes an Eighth Amendment violation whether or not significant injury is evident because "[w]hen prison officials maliciously and sadistically use force to cause harm, *contemporary standards of decency always are violated.*"[147] A respect for the dignity of the person is the basis for the concern that standards of decency—a concept that has at its roots a concern for dignity[148]—be upheld.

A concern for the dignity of the person also lies at the core of the prohibition against deliberate indifference to inmate medical needs.[149] The constitutional requirement that inmates' medical needs be fulfilled flows directly from a concern for the inherent worth of the human prisoner. Similarly, dignity concerns have also been expressly tied to cases of extreme failure to protect on the part of corrections officials in the allowance of

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[145] Ingraham v. Wright, 430 U.S. 651, 670 (1977) (quotation marks and citations omitted); *see* Whitley v. Albers, 475 U.S. 312, 320 (1986) ("The general requirement [is] that an Eighth Amendment claimant [must] allege and prove the unnecessary and wanton infliction of pain . . . .").

[146] Brewer v. Jones, No. 02 Civ.3570 NRB, 2003 WL 22126718, at *4 (S.D.N.Y. Sept. 12, 2003).

[147] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (emphasis added); *Trop*, 356 U.S. at 101 (1958) (holding repugnant to the Eighth Amendment punishments which are incompatible with the "evolving standards of decency that mark the progress of a maturing society" (internal quotations omitted)).

[148] 4 OXFORD ENGLISH DICTIONARY 326 (2d ed. 1989) (defining "decency" as "[w]hat is appropriate to a person's rank or dignity."). Interestingly, the notion that the malicious or sadistic use of force always violates contemporary standards of decency appears to be an acknowledgement that an action becomes degrading based upon the intent of the actor. This makes logical sense, *see* Castiglione, *supra* note 129, at 679 n.115, and is consonant with the "subjective prong" method of determining Eighth Amendment violations. And yet, it stands somewhat in contrast to the conception of a violation of a dignity interest, which typically centers on the reaction of the person being acted upon.

[149] Farmer v. Brennan, 511 U.S. 825, 825 (1994) ("[A]cting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.").

excessive inmate-on-inmate violence, which "is offensive to any modern standard of human dignity."[150]

Ultimately, it makes sense that dignity has settled at the center of cruel and unusual punishments doctrine, given widespread recognition that "[p]ractices of punishment are often infected by a dangerous impulse toward degrading the individual."[151] Courts can then be seen to have situated themselves as guardians of prisoners' interests, given the lack of any effective political constituency operating on their behalf, or as guardians of society's broader interest in treating offending members humanely,[152] thereby acting as checks on the "politicization" of punishment that some have argued cannot help but push to further "humiliate" and "degrade"

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[150] For instance, in *Farmer*, Justice Blackmun, in concurrence, ties inmate-on-inmate violence, rape in particular, to human dignity. 511 U.S. at 854 (Blackmun, J., dissenting) ("'Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity' . . . . Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure." (quoting United States v. Bailey, 444 U.S. 394, 423, (1980))); *see also* David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 STAN. L. REV. 1541, 1545 (1992).

[151] Whitman, *supra* note 8, at 98 (citing Jeremy Bentham, *Principles of Penal Law*, *in* THE WORKS OF JEREMY BENTHAM 365, 401 (John Bowring ed., 1843)).

[152] Stuntz argues that the casual relationship in fact runs in the opposite direction; he argues that courts' relative unwillingness to substantively regulate punishment (and eagerness to regulate policing and trial procedure) gives legislatures more room to operate, as it were, in the realm of punishment and incarceration, shifting resources and attention away from policing and trial procedure. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782–84 (2006). Others have similarly argued that it is upon courts that much of the blame lay for deteriorating prison conditions and increasing acceptance of cruelty in punishment. Haney, *supra* note 8, at 505 ("[The public has] been convinced that cruel treatment is a carefully considered, effective, and perhaps even the only viable strategy to be followed in achieving meaningful crime control. This shift, combined with the politicizing of the question of pain by the courts (many of whom have arguably abdicated their regulatory function in deference to explicitly popular, political forces) means that there are few if any limits on what can be done in the name of 'corrections,' even as we have abandoned any hope of ever correcting anything.").

prisoners.[153] The recognition by courts that they are in a unique position to protect the dignity of the prisoner is justifiable.[154]

To be sure, a noble respect for human dignity is not the only reason for maintaining standards of decency inside the prison walls, and is not the only basis upon which courts have erected this particular strand of jurisprudence. There are important practical reasons for treating prisoners with respect, or at least not brutalizing them. Evidence suggests that rehabilitative and deterrent efforts are undermined by degrading or dehumanizing conditions,[155] and in an era of overcrowded and violent facilities,[156] many have observed that institutional safety is in a large degree dependent on treating inmates with decency and professionalism.[157] The lessons of Attica—however ambiguous—should not be forgotten.[158]

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[153] Whitman, *supra* note 8, at 100–03 (arguing that the widespread acceptance of retributivism as the only moral basis for punishment has, in fact, exacerbated the problems of degradation and humiliation always present in the American system of punishment); *cf.* Haney, *supra* note 8, at 505 ("With unprecedented speed, national prison policy has become remarkably punitive, and, correspondingly, conditions of confinement have dramatically deteriorated in the United States.").

[154] It is beyond the scope of this article to offer a thorough exegesis of human dignity as a concept. Suffice it to say that I find it most helpful at this stage to define dignity in reverse, as Wright and others have. Wright, *supra* note 134, at 534 (arguing that because "dignity" as a concept is, to some extent, inherently ethereal, defining what dignity *stands in contrast to* is informative; dignity is best understood as standing in contrast to concepts like brutality, cruelty, humiliation, and "uncivilized or barbarous behavior"); *see* R.A. Duff, *Punishment, Dignity, and Degradation,* 25 OX. J. L. STUD. 141, 149–51 (2005) (noting that the concept of degradation offers important definitional lessons for conceptualizing dignity).

[155] M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. ECON. REV. 1, 1 (2007) ("[O]ur estimates suggest that harsher prison conditions lead to more post-release crime."); Drago et al., *Prison Conditions and Recidivism* 2 (IZA, Discussion Paper No. 3395, 2008), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1136200 (showing a positive correlation between certain aspects of harshness of prison conditions and recidivism; "our results indicate that the deterrent effects of bad prison quality on crime found by previous papers are probably due to deterring potential criminals and not criminals already treated by imprisonment").

[156] *See supra* note 8.

[157] *See* Richard G. Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons,* 21 BUFF. L. REV. 669, 669 (1972); Editorial, *Barbaric Jail Conditions*, N.J. L.J., Nov. 12, 2007, at 22 (discussing the "deplorable conditions" at New Jersey's Passaic County Jail and noting that "[i]nmate violence, caused by the predictable consequences of . . . overcrowded conditions, is common"); *cf.* Nilsen, *supra* note 13, at 125 ("[T]oday's prison conditions are harsher, more violent, and more degrading than anyone might have imagined in [an] earlier era.").

Curiously, though, concepts of dignity have not generally been explored in connection with questions regarding the existence (or lack thereof) of a proportionality principle. That is the subject to which I now turn.

B. *A Dignity-Centered Approach Suggests That Only Qualitative Proportionality Review Is Required by the Eighth Amendment*

As argued in the preceding section, there is deep support for the notion that the fundamental value underlying the Eighth Amendment is human dignity.[159] Put another way, the Eighth Amendment acts primarily to prohibit unreasonable degradations of the person in the administration of punishment.[160] If sufficient regard is given to this notion, the argument that the Eighth Amendment prohibits "excessive" quantitative punishments is weakened, and the argument that the Amendment only prohibits qualitatively disproportionate punishments is strengthened. This is because the length of a custodial sentence—or more generally the temporal length of any imposed sentence—has no apparent connection to the dignity interest. Rather, the

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On the other hand, some have observed how violence may, in some circumstances, be tolerated by corrections officials (and, by extension, society at large) as a method of imposing otherwise unconstitutional punishments on prisoners, and as a method of asserting enhanced institutional control. Sigler, *supra* note 8, at 581–82 ("In a 1994 survey, fifty percent of respondents said they believed that society accepts prison rape as 'part of the price criminals pay for wrongdoing.' Similarly, at least some prison staff reportedly view 'rape as a legitimate deterrent to crime and a just desert for its commission.' Other observers have suggested that rape is used as a 'management tool,' a means of maintaining 'peace' by 'allowing aggressive predators to have their way.' In extreme cases, prison staff have orchestrated inmate-on-inmate rapes to punish rules violations or to enhance the punishment of despised sex offenders.").

[158] In September 1971, prisoners at Attica Correctional Facility in upstate New York rioted and captured control of the facility. At the time, the facility—designed to hold around 1200 prisoners—held approximately 2200. While accounts differ as to the motives of the rioters, it is clear that the deplorable conditions at the institution played a major role in the insurrection. *See* BERT USEEM & PETER KIMBALL, STATES OF SIEGE: U.S. PRISON RIOTS 1971–1986 22 (1989) (noting that while "[l]ife at Attica was terrible," it was likely not worse than any other New York state institution at the time, but that "the standards by which inmates judged prisons changed dramatically" around the time of the riot, leading to the feeling amongst the population that conditions could no longer be tolerated). In any event, the revolt sparked widespread reevaluation of prison conditions. *Id.*

[159] *Id.*

[160] *See* Dubber, *Toward a Constitutional Law*, *supra* note 131, at 514 (arguing that *Atkins v. Virginia*, 536 U.S. 304 (2002), "refocused doctrinal attention on the rich, and largely unexplored, substantive core of the Eighth Amendment's prohibition of cruel and unusual punishments: the *dignity of the person*").

dignity interest speaks directly to the *type* of punishment imposed—in other words, the qualitative character of the punishment.

The dignity interest can be seen, then, to break the tie between the two plausible readings of the text discussed above,[161] and inform the purposive application of the Clause in a manner that suggests that only qualitative proportionality is required, because it is not clear how a quantitatively excessive custodial sentence would impact an individual's dignity interest.

Assuming that the conditions of a given prisoner's confinement are sufficiently humane so as not to constitute a qualitative proportionality violation,[162] the fact that a sentence is longer than it might otherwise be (i.e. it is quantitatively disproportionate) seems not to impact a dignity-based interest. Rather, it seems to impact a liberty- or autonomy-based interest. This distinction is important to understanding the quantitative/qualitative proportionality model suggested here. Arguments in support of quantitative proportionality review under the Eighth Amendment (either strong quantitative proportionality review, like many scholars support,[163] or weak quantitative proportionality review, like the Court applied in *Solem* and its progeny) contain an underlying assumption that, in essence, the individual has been imprisoned longer than he "should have been."[164] Such arguments generally are not made in reference to the dignity of the individual; rather, it is assumed that that the individual has been denied liberty, because the individual is prevented from leaving his jail cell for longer than is just.

Such arguments carry an implicit assumption that the Eighth Amendment protects a liberty or autonomy interest. In other words, these arguments assert that no person should be deprived of his liberty (via incarceration) longer than is "deserved" under whichever theory of punishment is assumed or applied. However, while one might argue normatively that the Cruel and Unusual Punishments Clause protects some sort of liberty interest, there is little or no indication in the text or history of the application of the Amendment that it has been or should be understood to protect a liberty-type interest, however it is defined. This is not surprising; the text barring the infliction of "cruel and unusual punishments"[165] seems, on its face, calibrated

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[161] *See supra* Part III.A.

[162] *See supra* Part III.A.

[163] *See supra* note 12.

[164] Such arguments have been legion in response to cases like *Harmelin*, *Ewing*, and *Lockyer*, where the convicted individual received life sentences for property crimes the severity of which, at least on first review, might not appear commensurate with the lengthy sentence. *See, e.g.*, D. Lee, *supra* note 9, at 530 (criticizing the "absolute deference to legislatively imposed sentencing protocols" in the wake of *Solem* and its progeny).

[165] U.S. CONST. amend. VIII.

to speak not to a liberty-type interest (in this formulation, the interest one has not to be incarcerated or immobilized against one's will by the state), but to some notion that punishments may not wantonly inflict pain, suffering, or humiliation on the convicted (and arguably that the punishers themselves be saved from inflicting such punishments).[166] Further, given that imprisonment as we know it was not a feature of the American system of punishment both during, and for a significant period after, the founding,[167] it would be difficult to argue as an originalist matter that the Eighth Amendment was intended or understood to speak to such a liberty-type interest.

What remains, then, is the purposive question: how can we best characterize the interest protected by the Cruel and Unusual Punishments Clause, and how can proportionality jurisprudence be constructed in such a way as to effectuate that value? The Supreme Court has answered the first part of this query; the fundamental interest protected by the Cruel and Unusual Punishments Clause is the dignity of the individual.[168] The answer to the latter portion of the question is the model I have proposed here. To the extent that punishments must "comport . . . with the basic concept of human dignity at the core of the [Eighth] Amendment,"[169] and to the extent that dignity as a concept stands in contrast to brutality, degradation, and humiliation, a proportionality regime can and should be styled such that punishments which serve to brutalize or degrade are within the ambit of the Cruel and Unusual Punishments Clause, and subject to qualitative proportionality review, but punishments that do not degrade or dehumanize— however "excessive" one might find them to be as a quantitative matter—are not within the scope of the Clause, and therefore may not be invalidated pursuant to it.

By way of example, some European nations have embarked upon a regime of incarceration animated by what the Germans call the "principle of approximation"—"the principle that life within penal institutions should

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[166] An acceptance of the notion that the Cruel and Unusual Punishments Clause is undergirded by notions of human dignity gives rise to intriguing questions regarding the extent to which the Clause could be plausibly understood to bar punishments the infliction of which would necessarily involve the degradation of the individual tasked with inflicting the punishment. Such discussions would involve foundational questions regarding the scope of the dignity interest (for instance, whether an individual's dignity can be undermined by the actions of that individual himself) and the administrability of such a regime in a constitutional republic that highly values personal autonomy.

[167] Note, *supra* note 13, at 967 ("Incarceration, the *sine qua non* of modern American punishment, played a very minor role in colonial criminal justice.").

[168] *Trop*, 356 U.S. at 100 (citing dignity as the fundamental value underlying the Cruel and Unusual Punishments Clause).

[169] Gregg v. Georgia, 428 U.S. 153, 182 (1976).

resemble life in the outside world as closely as possible."[170] Such a regime strives to eliminate what Americans would consider the hallmarks of a prototypical prison: uniforms, bars on the cell doors, and harsh behavior by guards (even if such behavior would be in some sense "justified" by the behavior of the prisoners).[171] Professor James Q. Whitman has tied this project to a European acceptance of the role of the concept of human dignity in punishment.[172] While one would rightly question whether an "approximation" system is particularly well-suited for the current moment in American sociopolitical history, it shares some obvious parallels with a proportionality regime that finds no constitutional violation with temporally extensive sentences as long as prison conditions adhere to notions of dignity.

Consider, for instance, a first-time offender named John. John steals a bicycle without resort to violence, is convicted of petty larceny, and is sentenced to twenty years in a state penitentiary. This clearly seems out of proportion to the crime under any theory; there seems to be no reason to believe that the community would need protection from John for that amount of time, or that such a sentence would be necessary to rehabilitate him (most likely, it would have the opposite effect), or that deterrent purposes would not be served by a lighter sentence. Further, almost anyone would say that such a sentence was more than John deserved as a matter of moral desert. Now, imagine that the prison to which John is sent is clean, safe, and John has access to reasonable levels of health care and rehabilitative services (education, skills training, and so forth). He can visit often with family and friends. The guards treat him with respect. And assume that these conditions persist for the duration of his stay. While one could argue, quite persuasively, that twenty years in prison is "excessive" in relation to the crime which John committed under any theory (and especially under principles of desert), one would be hard-pressed to argue coherently that John, in this hypothetical, has been stripped of his dignity. He is not subject to physical abuse or the threat thereof; he is provided the basic necessities of life in an advanced society; he has not been degraded or otherwise humiliated. All he lacks is freedom of physical movement (and, of course, the "life choices" that are denied him in prison). Under this hypothetical, John is subject to what would best be described as an imposition of his liberty or autonomy interest, and has suffered no apparent harm to his dignity, however "excessive" his sentence might be. In other words, while John's sentence may not be fair, and while it may not be beneficial to him or to society, it is just not clear that a dignity-focused Cruel and Unusual Punishments Clause has anything to say about it.

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[170] Whitman, *supra* note 8, at 97.

[171] *Id.*

[172] *Id.*

This does, however, bring up an important consideration: whether the dignity interest should be conceived as a subset of the autonomy interest (or even vice-versa).[173] If so, to the extent that a custodial sentence is an imposition on the autonomy interest (by severely limiting the "freedom of life choices" of the individual), it may also be an imposition on the dignity interest, and therefore quantitative proportionality review would be appropriate to an Eighth Amendment regime predicated on human dignity. In such a formulation, John's dignity would in fact be imposed upon by a lengthy incarceration, because he would be deprived of what many consider to be the *sine qua non* of a dignified life: the right to make fundamental life choices.

While this argument has appeal, I do not subscribe to it. The constitutional dignity interest, to the extent one believes it exists, seems best conceived as independent from an autonomy or liberty interest. While conceptions of dignity share characteristics with conceptions of how one lives one's life—the ability to make choices, etc.—the most promising construction of the "dignity interest" focuses on concepts like degradation, cruelty, and humiliation.[174] Such a conception does not appear to have strong ties to an autonomy or liberty interest, at least in the context of criminal punishment. Defining dignity as a subset of the autonomy interest is, further, to define it away; if one's dignity (in the constitutional sense) is part and parcel with one's freedom of movement or freedom to make life choices, then dignity has little or no value separate from autonomy or liberty. However, most conceptions of dignity as a concept suggest otherwise, and the Supreme Court has made clear that the Eighth Amendment does protect an independent dignity interest, distinct from more traditional notions of liberty or autonomy.[175]

C. *Consequences for Reform*

This leads to an important point regarding the real world consequences of the model presented here. Justice Souter remarked in *Lockyer* that "if [a] sentence [of life for a third offense of felony petty theft] is not grossly disproportionate, the principle has no meaning."[176] That may well be true. It

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[173] *See* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 465–66 n.246 (2005) [hereinafter Markel, *State*] (discussing unsettled interplay between dignity and autonomy).

[174] *See supra* notes 155–57 and accompanying text; Duff, *supra* note 154, at 149–51; Wright, *supra* note 134, at 527.

[175] *See supra* notes 168–70 and accompanying text.

[176] Lockyer v. Andrade, 538 U.S. 63, 83 (2003).

may certainly be the case (and I tend to think it is) that locking up petty criminals for extremely long periods of time is a bad idea,[177] and is arguably inconsistent with a defensible application of each basic theory of punishment, to the extent that each theory demands punishment be calibrated so as to either (1) best serve society's, the prisoner's interests, or both, or (2) be retributively fair to the offender.[178] Certainly, one could argue coherently that the paradigmatic petty criminal often would not "deserve" to be locked up for years or for life, and that society would also not be optimally served, because such an individual would not be "rehabilitated" by such a sentence (and probably would be more likely to re-offend as a consequence).[179] Society would also not be effectively "protected" by his incapacitation, since that individual did not represent any significant threat in the first place.[180] The increasing dissatisfaction over Rockefeller-like drug laws and recidivist statutes, especially in the face of increasingly distressing empirical data concerning those laws' effectiveness (or lack thereof), is worth recalling here.[181]

The deterrent goals of punishment, both general and specific, are also likely not served by quantitatively disproportionate sentencing. Regarding specific deterrence, there is evidence that harsh prison conditions (independent of "teaching" effects) can increase recidivism.[182] This is an especially trenchant observation given the bloated and deteriorating state of the American prison system.[183] Extremely long sentences do not significantly reduce the likelihood of re-offending; rather, the risk of re-offending is merely shifted to inside the prison walls.[184] In addition, there is little or no evidence that lengthy prison sentences reduce crime in the aggregate, casting

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[177] Nilsen, *supra* note 13, at 117–19 (criticizing the American tendency toward long prison sentences).

[178] *See* Headley, *supra* note 17, at 248, 253 (describing an Eighth Amendment regime that does not include quantitative proportionality as "unfair").

[179] Nilsen, *supra* note 13, at 134–39 (exploring "post-conviction disabilities" and recidivism).

[180] These arguments apply with special force to petty drug related crimes, especially in cases of true simple possession.

[181] The most prominent of those regimes, New York's "Rockefeller drug laws," was a source of immense consternation for decades, only recently having been repealed. Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1.

[182] Chen, *supra* note 155, at 1; Drago, *supra* note 155, at 3; Nilsen, *supra* note 13, at 134–39.

[183] *See supra* note 8 (discussing recent work on the deteriorating state of the American prison system).

[184] *See infra* note 210.

doubt on notions of general deterrence.[185] Certainly, utilitarian parsimony goes out the window in such a scenario.

Ultimately, it is easy to simply feel uncomfortable (as Justice Souter did) with the notion that there is no constitutional remedy available to an individual who is condemned to spend most—or even a significant portion—of his life behind bars for a middling offense.[186] These are not, however, arguments that are particularly appropriate for determining the best meaning of the Cruel and Unusual Punishments Clause. "[N]ot every good idea finds a home in our Federal Constitution."[187] As I have argued above, if one accepts

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[185] *See, e.g.*, Richard L. Lippke, *Crime Reduction and the Length of Prison Sentences*, 24 L. & POL'Y 17, 17 (2002) ("The issue discussed is whether policies of imposing increasingly lengthy prison sentences on serious criminal offenders reduce crime. The empirical evidence for the deterrence and incapacitation effects of incarceration is first examined and found to be of limited help in answering the question whether lengthy prison sentences reduce crime. Conceptual and normative analysis of deterrence and incapacitation suggest that we have little reason to believe that the general use of lengthy prison terms produces more good than harm for society, especially if the burdens of and alternatives to such prison terms are taken into account."); *see also* William J. Stuntz, *Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns—Understanding the Unraveling of American Criminal Justice*, 119 HARV. L. REV. F. 148 (2006) (noting the lack of correlation between imprisonment rates and crime reduction).

[186] A recent decision by the Ninth Circuit vividly demonstrates the problem. In *Gonzalez v. Duncan*, the petitioner was convicted by a jury of failing to update his annual sex offender registration within five working days of his birthday, in violation of California law. Gonzalez v. Duncan, 551 F.3d 875, 878 (9th Cir. 2008). Gonzalez did not change residences; rather, he simply failed to alert the state in a timely fashion that he still resided at the address the state had on file. *Id.* Because of his prior criminal convictions, Gonzalez received a sentence of twenty-eight years to life imprisonment under California's "Three Strikes" law. On habeas review, the Ninth Circuit found that the sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment under *Solem* and *Lockyer*. *Id.* at 891. Writing for the court, Judge Bybee held that "[i]n comparison to the passive, harmless, and technical violation that triggered Gonzalez's sentence, the severe penalty imposed on [Gonzalez] appears disproportionate by any measure." *Id.* at 886 (quotations omitted).

Clearly, it would seem a miscarriage of justice to allow an individual to spend the rest of his life in prison for "a technical violation of a regulatory crime of omission," as Judge Bybee put it. To do so would seem to be the height in bureaucratic illogic. *Cf.* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334 n.6 (2008) (arguing that the rise in administrative law as a "pervasive force" in criminal law has weakened the exercise of mercy in connection with punishment in both obvious and non-obvious ways, including the exercises of parole, sentencing, executive clemency, and jury nullification).

[187] Stephen E. Henderson, *"Move On" Orders as Fourth Amendment Seizures*, 2008 B.Y.U. L. REV. 1, 5. "In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be

the purposive argument presented here—that the Eighth Amendment exists primarily to protect human dignity—there is no reason to believe that the underlying purpose of the Eighth Amendment requires quantitative proportionality. By implication, there is no reason to believe that the Constitution has anything whatsoever to say about how best to punish offenders so as to reduce crime or how to treat the offender "fairly," short of its pronouncement that the nation and the offender are best served when punishments are not torturous or otherwise barbarous.[188]

I will not belabor, except to mention briefly, that there are many more appropriate (and likely effective) ways to ensure the imposition of sentences that serve society and prisoners' interests in justice and thrift: legislative abolition of mandatory minimums, alternative punishment for non-violent drug offenders, targeted decriminalization, three-strikes reform (to prevent the types of unfairness observed in cases like *Lockyer*, *Ewing*, and others), and real efforts to establish rehabilitative programs in prison facilities. While these are difficult challenges that will require political will (and funding) that may or may not be easily summoned,[189] success will prove more comprehensive. Despite scholars' best efforts, history suggests that truly systematic, effective sentencing reform will never come about through the courts, especially not through proportionality jurisprudence.[190] While the occasional appellant will win the lottery and have his custodial sentence

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remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment." *Id.* at 5 n.18 (citing *Hudson*, 503 U.S. at 18 (Thomas, J., dissenting)).

[188] *See supra* Part III.B.2.

[189] Recent high-profile efforts have been undertaken to begin addressing this constellation of related issues. In December, 2008, Senator James Webb announced his intention to pursue prison and sentencing reform. Sandhya Somashekhar, *Webb Sets His Sights on Prison Reform*, WASH. POST, Dec. 30, 2008, at B01 ("This spring, Webb (D-Va.) plans to introduce legislation on . . . reforming the U.S. prison system . . . . Webb aims much of his criticism at enforcement efforts that he says too often target low-level drug offenders and parole violators, rather than those who perpetrate violence . . . . [h]e also blames policies that strip felons of citizenship rights and can hinder their chances of finding a job after release."). Early skeptics were in bountiful supply. Jonathan Stein, *Jim Webb Takes on Prison Reform*, MOTHER JONES (Dec. 29, 2008), http://www.motherjones.com/mojoblog/archives/2008/12/11497_jim_webb_prison_reform.html ("Senator Jim Webb (D-VA) is about to take on one of the most thankless issues in America: prison reform.").

[190] *See* United States v. Polizzi, 549 F. Supp. 2d 308, 361 (E.D.N.Y. 2008) ("Even though many would characterize some mandatory minimum sentences as 'draconian,' the Supreme Court has repeatedly upheld their constitutionality . . . ."); Ristroph, *Sexual Punishments*, *supra* note 50, at 174 ("Distinct from the failures of the Supreme Court's Eighth Amendment doctrine . . . there may exist unavoidable limits on the utility of the Eighth Amendment as a tool to reform prisons . . . .").

struck down on disproportionality grounds, like in *Gonzalez*,[191] virtually no defendants are, or will be, served by continued attempts to fit the square peg of quantitative proportionality into the round hole of the Cruel and Unusual Punishments Clause.

V. CONSEQUENCES FOR RETRIBUTIVE THEORY

The thoughts presented here have important consequences for retributive punishment theory. The Court's project of defining the scope of proportionality under the Eighth Amendment, undertaken in the "Proportionality Sextet" of *Lockyer*,[192] *Ewing*,[193] *Harmelin*,[194] *Solem*,[195] *Hutto*,[196] and *Rummel*,[197] spans the last thirty years, beginning with *Rummel* in 1980. This rather tightly coincides with the rise of retributivism as a widely accepted justification for punishment, in theory and increasingly in practice over the same period.[198] The embrace of retributivism has occurred amongst all the players in the criminal justice system: academics,[199] lawmakers (including the drafters of the Model Penal Code),[200] and jurists.[201]

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[191] *Gonzalez*, 551 F.3d at 891; *see supra* note 186.

[192] Lockyer v. Andrade, 538 U.S. 63, 77 (2003).

[193] Ewing v. California, 538 U.S. 11, 30 (2003).

[194] Harmelin v. Michigan, 501 U.S. 957, 983 (1991).

[195] Solem v. Helm, 463 U.S. 277, 288–89 (1983).

[196] Hutto v. Davis, 454 U.S. 370, 375 (1982).

[197] Rummel v. Estelle, 445 U.S. 263, 274 (1980).

[198] Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1179 (2009) [hereinafter Markel, *Executing Retributivism*] ("[S]upport for retributivism has re-emerged over the last thirty years. Indeed retributive justice notions are currently regarded as sufficiently respectable as to justify punishments ranging from the death penalty for murder to punitive damages."); Whitman, *supra* note 8, at 197 (noting the rise of retributivism over the past three decades).

[199] *Id.*

[200] Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 4 (2003) ("The Report adopts as its principle what it describes as 'limiting retributivism' . . . .").

[201] *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 555 (1998) (exploring the "retributive and deterrent functions" of law).

The story of retributivism's acceptance on the Supreme Court is a remarkable one; less than half a century ago, retributivism (or concepts relating thereto) was often described by influential Justices as nothing more than "naked vengeance" that was "masked in formal legal procedure." *In re* Yamashita, 327 U.S. 1, 41 (1946) (Murphy, J.,

In its most basic form, retributive theory posits that punishment of the offender finds its value "without reference to the contingent benefits that the public might (or might not) enjoy . . . .The value . . . is internal to its practice and is not contingent upon the achievement of some future benefit . . . . "[202] In other words, punishment in response to a criminal act is justified in and of itself, independent of any utilitarian benefit that might accrue to society as a result of the punishment.[203] Although accounts of retributivism differ in certain important respects, I will not delve into the details of those differences here. [204] Rather, it is sufficient for our purposes to say that retributivism posits that just systems of punishment must incorporate the notion that only those that deserve to be punished should be punished, and that equivalence between the offenders' desert and the punishment inflicted must exist for a given punishment to be justifiable.[205] Systems that fail to account for retributive desert are, under this set of theories, unjust, and—importantly—out of sync with the public's general conception of the proper

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dissenting); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 189 (1963) (Brennan, J., concurring) (describing retribution as "naked vengeance"). While describing the evolution of Court personnel on this point over the last-half century is beyond the scope of this article, the rise in retributivism's acceptance on the Court coincides neatly with retributivism's acceptance amongst academics and lawmakers.

[202] Markel, *Executing Retributivism*, *supra* note 198, at 1176.

[203] In contrast, utilitarian or instrumentalist theories of punishment posit essentially that society should accrue a benefit from the punishment inflicted upon the individual. Future offenders are deterred from acting because they have observed the punishment visited upon the present offender (or fear it being inflicted on themselves); the offender is removed from society for the duration of the punishment (forever in the case of capital punishment), thus keeping society safe from the offender during that period, or the offender is metamorphosed in such a way as to remove his desire (or, depending on the theory, ability) to re-offend.

[204] Perhaps the most prominent cleavage is between those who believe that retributive theory *permits* punishment on the basis of the moral desert of the actor (so called "permissive" or "negative" retributivism) and those who believe that retributive theory *requires* punishment equal to the moral desert of the offender ("mandatory" or "positive" retributivism). Other accounts distinguish between pure retributive theory and "desert" theory, although the differences between retributivism and desert theory can be slight and account for little practical distinction.

[205] Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishments Clause*, 68 TENN. L. REV. 41, 61 (2000) ("In contrast to utilitarian theories, retribution theory offers a principled basis for proportionality. Andrew von Hirsch states that the '[s]everity of punishment should be commensurate with the seriousness of the wrong.' He justifies this statement with the following three-step argument. First, the main purpose of the criminal sanction is to express censure for particular conduct (that is, retribution). Second, the severity of the sanction conveys the magnitude of the censure. Third, as a result, criminal sanctions should be proportioned to the severity of the conduct because to do otherwise would be unjust.").

basis for punishment, which retributivists argue is based in large part on the public's belief that criminals simply deserve to be punished.[206] Professor Paul H. Robinson describes a typical account of a retributive punishment scheme thusly:

> [A] distributive [retributive] principle might be outlined in this way: (i) In determining punishment, look to the extent of the offender's blameworthiness (including the seriousness of the offense), (ii) but reliance upon the traditional utilitarian purposes of rehabilitation, general deterrence, and incapacitation of the dangerous, as well as "restoration of crime victims and communities," is permitted where the purpose can effectively be achieved, (iii) but such reliance may not produce punishment in conflict with the offender's degree of blameworthiness.[207]

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[206] James O. Fickenauer, *Public Support for the Death Penalty: Retribution as Just Deserts or Retribution as Revenge?*, 5 JUST. Q. 81, 93 (1988) ("[C]onsiderable support for a retributive doctrine of punishment exists both in the general public and among judges, philosophers, and legal scholars."); *see also* Parr, *supra* note 206, at 59 ("Most persons readily accept the claim that the severity of a sentence should be proportioned, in some measure, to the offense committed.").

[207] Robinson, *supra* note 200, at 4–5. It is worth presenting here a short overview of the theory behind the utilitarian theories of punishment for purposes of comparison:

> Incapacitation theory strives to reduce crime by physically preventing offenders from committing additional crimes. Determination of sentences under incapacitation theory derives primarily from an assessment of the offender's likelihood of re-offending. The assessment is based on criteria such as prior criminal history and drug use. A dangerous person who committed a minor crime, for example, could be sentenced more severely than a nondangerous person who committed a more serious crime in the heat of passion. In addition, someone who had not even committed a crime could be incapacitated based on his likelihood of offending for the first time . . .
>
> Deterrence theory relies on the threat of punishment to deter persons at large (general deterrence) or particular individuals (specific deterrence) from offending or re-offending, respectively. In a deterrence-based system, the magnitude of punishment is determined by comparing the benefits of crime reduction to society, achieved through threat of punishment, with the costs of punishment to the object of punishment, usually the offender. Common critiques of general deterrence theory state that it justifies the punishment of innocent people and the severe punishment of minor offenders (exemplary sentences) if such sentences would deter others from offending. Specific deterrence theory suffers from the same critiques leveled against incapacitation theory. . . .
>
> Rehabilitation theory seeks to prevent crime by affecting positive change in offenders so that they no longer desire to commit crimes. The crucial issue for the sentencer under rehabilitation theory is "not the gravity of the offense committed" but the "needs of the offender."

Parr, *supra* note 205, at 60–61.

While a thorough exegesis of retributive theory and critiques thereof would take more space than is available here, it is important for our purpose to note that one feature of all variations on retributive theory is that proportionality between crime (or the culpability of the offender) and the punishment imposed is necessarily implied.[208] In the words of Professor Donald A. Dripps, "all retributive theories share a family resemblance, rooted in the reciprocal ideas that punishment can be deserved, and thus it should never be undeserved."[209] "[A] punishment would be excessive [under principles of desert] if the degree of condemnation symbolized by the amount of punishment were too high relative to the criminal's blameworthiness."[210] This makes sense; if you are to be punished because you deserve to be punished, it should be uncontroversial that you not be punished more than in fact you "deserve," however that desert is defined.[211] Excessive punishment would serve no retributive purpose, since the optimally-punished offender has already received everything that is in fact deserved. Punishment imposed beyond the retributively-acceptable amount could therefore only be justified on non-retributive utilitarian grounds (e.g. a desire to deter, or to further

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[208] *See, e.g.*, Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 575 (2009) ("A common objection [to three strikes laws by desert theorists] is based on the principle that punishment should be proportional to the crime."); Markel, *Executing Retributivism*, *supra* note 198, at 1215 (citing J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, *in* PHILOSOPHY OF LAW 677, 678 (Joel Feinberg & Hyman Gross, eds., 4th ed. 1991) (discussing the "quantitative variant of negative retributivism, that even if someone is guilty of a crime it is wrong to punish him more severely than is proportional to the crime"); Markel, *State*, *supra* note 173, at 434–35 (discussing "frugal proportionality" in the context of retributive systems); Robinson, *supra* note 200, at 1442 ("[T]he principle of desert necessitates an ordinal ranking of cases—justice requires that offenders of lesser blameworthiness receive less punishment than offenders of greater blameworthiness. Given the finite range over which the amount of punishment can vary and the large number of distinctions commonly recognized between degrees of blameworthiness, the punishment deserved in a particular case falls into a narrow range.").

[209] Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1423 (2003).

[210] Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 79 (2007).

[211] *See supra* note 209. A less discussed corollary to this notion is that one should also not be punished *less* than one deserves, although not all permissive retributivists would necessarily agree. *See* Dripps, *supra* note 209, at 1422 ("Retributivists disagree about whether blameworthy conduct affirmatively requires punishment or merely permits punishment if the balance of other considerations so inclines."). For instance, Professor Lee's model of retributivism as a side-constraint to proportionality review would not necessitate punishment equal to the desert of the actor, only that the punishment not go beyond the retributively-permissible maximum. Y. Lee, *Constitutional Right*, *supra* note 16, at 721–35.

incapacitate the offender), or would otherwise be an exercise of simple vengeance. [212]

A model of proportionality review, then, that does not require quantitative proportionality between crime and punishment has important implications for retributive theory as it relates to constitutional criminal procedure. While retributivists are careful to note the Supreme Court's declaration that "the Constitution does not mandate adoption of any one penological theory"[213] (the Non-Preference Doctrine), and argue merely that retributive principles should stand beside these other theories in evaluating the constitutionality of a given sentence, the retributive notion that courts are constrained, via the Eighth Amendment, in the punishments they can inflict upon an offender by principles of desert[214] does in fact call for a grafting of a

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[212] Some argue that utilitarian systems of punishment do not (and indeed cannot) share this concern with proportionality. For instance, Parr argues that "[no] utilitarian theories of punishment . . . requires or even suggests a proportionality requirement." Parr, *supra* note 205, at 60–61. He continues:

> Fundamentally, all utilitarian theories are forward-looking or consequentialist; they look to future behavior, future harm, and future benefits. Proportionality between sentence and offense, however, is necessarily backward-looking; it looks to the severity of the offense already committed. Therefore, punishments distributed according to a utilitarian theory can only be proportionate or serve as a guide to proportionality by accident.

Id. at 60–61, 64 ("[O]nly retribution theory provides a sound theoretical basis for developing a proportionality principle."). Many, as Parr recognizes, have disagreed, including Bentham, Beccaria, Rawls and others. *Id.* at 61–63 (discussing utilitarian defenses of proportionality); *see also* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (arguing that there is no utilitarian justification for a system that has no upper limit on punishment).

One might further posit that over-punishment (both as a general and a specific matter) might in fact encourage further criminality. *See supra* notes 172–81 and accompanying text. Similarly, it seems that one could posit a utilitarian system of incapacitation that requires an upper limit on the quantitative component of incarceration, if one believes that excessive prison terms remove any incentive for prisoners to behave peaceably while on the inside (or even encourage further offending in the facility). To the extent that one recognizes that prisons themselves are societies (with guards, personnel, and prisoners as the primary members, and with families and other acquaintances of prisoners as less directly affected members of that society), a wildly excessive prison term that removes incentive for good behavior does not prevent further crimes (i.e. it does not truly "incapacitate")—it merely changes the society in which the individual commits his offenses.

[213] *Ewing*, 538 U.S. at 25 (quoting *Harmelin*, 501 U.S. at 999 (internal quotation marks omitted)).

[214] *See, e.g.*, E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 129–53 (Oxford Univ. Press 2008) (discussing retributive interpretations of the Eighth Amendment); Y. Lee, *Constitutional Right*, *supra* note 16

retributivist requirement onto the Cruel and Unusual Punishments Clause in contravention of the Non-Preference Doctrine.

My proposal here—that the Eighth Amendment does not in fact require (or, in a stronger formulation, permit) courts to calibrate the quantitative aspect of a punishment—serves as a specific critique on retributive accounts of Eighth Amendment proportionality. If the Eighth Amendment allows a prisoner to be quantitatively punished in excess of what one might consider the offender to have "deserved" under retributive theory, then a major plank of the retributivist argument—that retributivism is required (or at least endorsed) by the Eighth Amendment [215]—is undermined.

A step back is perhaps in order. In essence, what these retributivists have done—under the guise of respecting the Non-Preference Doctrine—is assume the principle that they seek to prove. They argue that the language of the Cruel and Unusual Punishments Clause (sub silencio, of course) requires proportionality between crime/culpability and punishment. This, they argue, is fundamentally a retributive principle.[216] Some level of retributivist constraint on punishment must be therefore mandated by the Eighth Amendment.[217] Going further, these retributivists argue that because retributivism is mandated by the Eighth Amendment, retributive punishment should be understood as fundamental to the American system of punishment, and therefore retributive goals should be further generalized.[218] I see things precisely reversed. As I have argued above, the Cruel and Unusual Punishments Clause (as understood through a dignity-purposive lens) should be understood to do nothing to limit the quantitative component of a

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(arguing that principles of desert properly should act as a "side constraint" in the determination of punishments under the Eight Amendment); *see also* Y. Lee, *Desert*, *supra* note 137 (discussing the "view [that] the purpose of the Eighth Amendment is to enforce the retributivist constraint," a view that "coheres well with a common image of constitutional rights in general and of the Cruel and Unusual Punishments Clause in particular, as the Clause is typically understood as playing the role of holding the excessive, and frequently irrational, punitive instincts of 'the people' in check by imposing a moral constraint.").

215 *See* sources cited *supra* note 214.

216 *See supra* note 201.

217 *See, e.g.*, Y. Lee, *Constitutional Right*, *supra* note 16, at 683 ("[T]he Eighth Amendment ban on excessive punishment should be understood as a constitutional norm adapted from the retributivist principle that the harshness of punishment should not exceed the gravity of the crime—one should not be punished more harshly than one deserves.").

218 *See* Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 706 (1995) (arguing that recidivist sentencing laws "have nothing to do" with the individual's contemporary desert); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1434–38 (2001) (arguing that repeat offenders receive punishments in excess of what is deserved).

punishment.[219] By implication, it would be error to require retributive principles (as a side-constraint or otherwise) be applied to the quantitative component of a punishment under the guise of a faithful application of the Eighth Amendment because nothing in the Eighth Amendment rightly limits the quantitative component of a given punishment.[220] As such, under the model presented here, the Eighth Amendment is decidedly *not* a basis for retributive limits on sentence length, and should not be used as support either for constitutional retributive side-constraints, or for a wider application of retributive principles in American criminal law.[221]

To be clear, the normative account presented here should not be read as a general critique on retributive theory itself. Such an effort—while in my opinion ripe for renewal—is beyond what I hope to accomplish in this article. Indeed, my account of *qualitative* proportionality under the Eighth Amendment presents no critique at all of retributivism; there is nothing in this account which would, in theory, prevent a court from using retributive principles to find an Eighth Amendment violation based upon the qualitative component of a punishment.[222] This is consistent with the Non-Preference Doctrine, allowing courts to apply principles of any theory (retribution, incapacitation, deterrence, or rehabilitation) to determine whether the qualitative aspect of a given punishment is disproportional. In fact, such an exercise would be natural under the model presented here; surely one could imagine a scenario whereby the conditions of confinement were so offensive to human dignity as to constitute punishment beyond that deserved by the offender, without reference to utilitarian goals. Equally, there is a large body of literature that questions the imposition of the death penalty from a

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[219] *See supra* Part III.

[220] *See supra* Part III.

[221] Justice Marshall, for one, was notoriously wary of viewing the Eighth Amendment as primarily retributive in nature; indeed, he believed that the Amendment was adopted in part to counter the temptation to apply retributive principles too vigorously to American criminal law. *See* Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) ("Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."). However, even he recognized retributivism's growing acceptance. *See, e.g., id.* at 394–95 ("There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements . . . . It would be reading a great deal into the Eighth Amendment to hold that . . . punishments . . . cannot constitutionally reflect a retributive purpose.").

[222] *But see* Robinson, *supra* note 200, at 11 ("[D]esert generally cares about punishment amount, not punishment method.").

retributive perspective,[223] and the model presented here does little to disturb those efforts.[224]

Those who advocate for more humane prison conditions would find a natural home under this proposed model, especially those who question the practice of placing non-violent petty offenders in prison, where they are surrounded by hardened, often gang-affiliated lifers, typically in over-crowded conditions.[225] Of course, such conditions might also just as comfortably be questioned from a rehabilitative perspective, as well as a "societal self-protection" perspective, given the widespread belief that such conditions turn relatively inexperienced offenders into the proverbial better class of criminal.[226]

Rather, readers should take this model as a specific critique on efforts of retributivists to extend their efforts into the area of constitutional criminal procedure via the Eighth Amendment. Given a jurisprudence centered, as the Court held in *Trop*, around the protection of human dignity,[227] it is simply not clear that the Eighth Amendment says what these retributivists want it to say—that is, that the quantitative component of punishments (most often the temporal length of a custodial prison sentence) must be proportionate to the desert of the actor.[228] Rather, the Eighth Amendment, properly understood,

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[223] *See, e.g.*, Markel, *Executing Retributivism*, *supra* note 198, at 1177 (arguing that the Supreme Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), which struck down the death penalty for offenders who cannot rationally understand why they are being killed, adopts a theory of communicative retributivism that undermines the death penalty generally, given that the communicative exchange between the government and the offender via the punishment is wasted on individuals who are killed by the very punishment that is the communicative tool).

[224] To the extent one reads cases like *Coker*, *Atkins*, and *Roper* as proclamations by the Court that capital punishment should not be applied to special groups of offenders because they do not deserve it (based on their status as minors, mentally disabled, or because of insufficiently serious culpability), the model presented here has important implications. Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Coker v. Georgia, 433 U.S. 584 (1977); *see* Markel, *Executing Retributivism*, *supra* note 198, at 1177; *see also* Y. Lee, *Constitutional Right*, *supra* note 16.

[225] Gregory L. Aquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 974 (2006) (describing the "detrimental forces" at work in "overcrowded, ill-equipped jails and prisons").

[226] *See supra* notes 172–81 and accompanying text.

[227] Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[228] There are, of course, non-constitutional solutions to excessive sentencing: changing the penalties associated with given crimes, executive clemency (state and federal), amending the Constitution to add an explicit "excessive custodial sentence" clause, etc. One may legitimately question the odds of any such alternative solutions gaining widespread acceptance given the incentives of political actors.

does not limit the length of custodial sentences, regardless of the desert of the actor, so long as the punishment imposed does not unduly infringe upon the dignity interests of the individual. And so, if the Eighth Amendment does not encapsulate a quantitative proportionality component, then the argument that there is (or should be) a retributive side constraint on the length of criminal sentences under the Constitution is greatly weakened.[229]

VI. CONCLUSION

> When the prison gates slam behind an inmate, he does not lose his human quality . . . his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment.[230]

Eighth Amendment jurisprudence is not a "mess."[231] Put more precisely, it need not be a mess if courts and academics remain focused on the purpose behind the Eighth Amendment, which, in the words of Chief Justice Warren, is "the dignity of man."[232] If that is the goal—and a worthy goal it is—then the charge of the courts is to ensure that no punishment be inflicted upon an individual that is an affront to human dignity. I have argued that human dignity can best be conceptualized in reference to its relationship to cruelty, humiliation, and degradation.[233] Viewed through this dignity lens, an Eighth Amendment proportionality jurisprudence organized around the concepts of quantitative and qualitative proportionality makes sense; the role of the courts is to (1) ensure that the types of punishments from which a court may select comport with abstract notions of human dignity, and (2) that the manner in which the chosen punishment is actually inflicted upon the

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[229] To be sure, many have made retributive arguments against the more odious features of the American system of punishment—arguments that do not rely on the Eighth Amendment or seek to constitutionalize retributive principles, *see, e.g.*, Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 CRIM. L. & CRIMINOLOGY 395, 425–33 (1997) (critiquing three strikes statutes on retributive grounds), even though there is reason to believe that it is *because of* the widespread acceptance of retributive thinking that such regimes were spawned in the first place. Whitman, *supra* note 8.

[230] Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

[231] *See supra* note 9.

[232] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[233] *See supra* Part IV; *see also* Castiglione, *supra* note 129, at 679 ("Because dignity as a concept is, to some extent, inherently ethereal . . . defining what dignity stands *in contrast to* is informative in determining what it actually *is* . . . dignity stands in contrast to 'brutality, cruelty, . . . humiliation, uncivilized or barbarous behavior, harsh treatment,' . . . and so on. Others have [noted] that the concept of 'degradation' offers important definitional lessons." (internal citations omitted)).

individual does not unnecessarily infringe upon that individual's dignity interest.[234]

Second-guessing the length of a custodial sentence does not fall within that purview because it appears not to be the case even as an abstract matter that the dignity interest is necessarily implicated by the length of custodial sentence.[235] Rather, the dignity interest is implicated only by the conditions of the sentence (and arguably by the fact that a custodial sentence was imposed at all).[236] This conclusion is buttressed by arguments that quantitative proportionality review appears not to be textually authorized by the Eighth Amendment;[237] and that, pace Justice Scalia, there is no practicable way for courts to engage in quantitative proportionality review consistent with the role of a court in a federal system.[238]

Of course, the Court's holdings since *Rummel* have been less than clear on what exactly are the contours of permissible proportionality review for custodial sentences.[239] The Court has gone from essentially rejecting the notion of quantitative review in *Rummel*,[240] to resurrecting it in *Solem* (in an opinion written by Justice Powell, who dissented in *Rummel*),[241] to

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[234] Again, room might also be made here for a proportionality jurisprudence that excludes under the Eighth Amendment punishments that require the punishing agent to degrade himself (like torture), *see supra* note 166 and accompanying text, although such an understanding would be at the very margins of proportionality and general dignity theory.

[235] *See supra* Part IV.

[236] Whether an individual's dignity interest is implicated by the mere fact that a prison sentence was imposed at all for a particular crime is questionable (unlike the obvious dignity implications of the imposition, for example, of a court-imposed public humiliation). Strong arguments can be made that the liberty interest is most implicated by the fact of the imposition of a custodial sentence. This, of course, assumes that the liberty and dignity interests are clearly defined and accepted as exclusive of one another, which is unclear under current theories.

[237] *See supra* Part III.B.1.

[238] *See supra* Part III.

[239] *See supra* notes 31–39 and accompanying text.

[240] Rummel v. Estelle, 445 U.S. 263, 274 (1980) ("[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.").

[241] Solem v. Helm, 463 U.S. 277, 288–89 (1983) ("There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment.").

muddying the conceptual waters in *Harmelin*.[242] Today, the Supreme Court has an opportunity to clear up the doctrinal confusion once and for all on the question of whether quantitative proportionality review has a future in Eighth Amendment jurisprudence.[243]

Perhaps the drafters and adopters of the Eighth Amendment were wise to prohibit only cruel and unusual punishments, a prohibition that seems comfortably within courts' competence to enforce. Perhaps they were wise to omit reference to "excessive" or "proportional" punishments, which increasingly seem outside courts' institutional competence to enforce with any degree of rationality.[244] Courts and commentators would be wise to hew more closely to the Framer's calculated linguistic choice, and should abandon the pursuit of a goal—the requirement of proportionality between crime, culpability and quantitative punishment under the Eighth Amendment—that has proven itself elusive.

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[242] Harmelin v. Michigan, 501 U.S. 957 (1991). *Harmelin* produced five separate opinions; only one part of Justice Scalia's opinion garnered even a bare majority.

[243] As of this writing, Chief Justice Roberts and Justices Alito and Sotomayor have yet to address proportionality. Further, there is little in their lower court history upon which to base confident predictions.

[244] *See supra* Part II.